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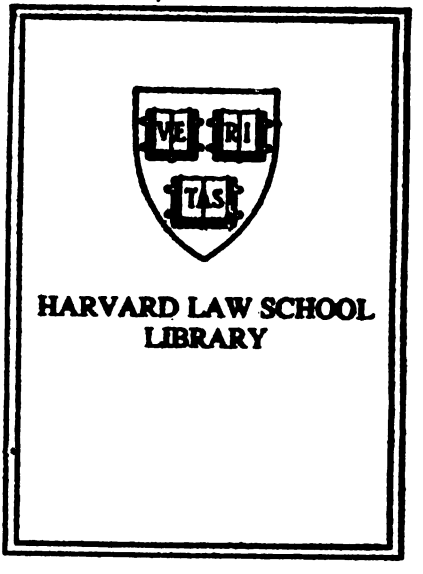

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MINNESOTA REPORTS

43

VOL. 65

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

JUNE 2, 1896—JULY 17, 1896.

HENRY B. WENZELL
REPORTER

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Rec. Dec. 27, 1897.

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JUSTICES

OF THE

SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

HON. CHARLES M. START, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. LOREN W. COLLINS.
HON. DANIEL BUCK.
HON. THOMAS CANTY.

DARIUS F. REESE, Esq., Clerk.

ATTORNEY GENERAL,
HON. HENRY W. CHILDS.

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NOTE.

By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases in this volume are from the April, 1896, term calendar.

As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

DAVID TOZER v. J. C. O'GORMAN, Receiver, and Others.[1]

June 4, 1896.

Nos. 9754—(97).

Corporation—Receiver—Stockholder—Enjoining Entry of Judgment.

Held, following O'Gorman v. Sabin, 62 Minn. 46, that the trial court did not err in dissolving an injunction in this action restraining the plaintiff in the first-named action from entering judgment on his verdict therein.

Appeal by plaintiff from an order of the district court for Washington county, Williston, J., dissolving an injunction. Affirmed.

J. N. Castle, for appellant.

J. N. Searles, for receiver, respondent.

START, C. J. This action was brought by the plaintiff, Tozer, on behalf of himself and others similarly interested as stockholders of the corporation of Seymour, Sabin & Co., against O'Gorman as receiver of such corporation, and against O'Gorman personally, and other defendants. The gist of the cause of action alleged in the complaint is that O'Gorman, as receiver, was directed by the court to sell the property of the corporation of Seymour, Sabin & Co., and he did sell the same to the defendant Searles for $55,000, who directed the property

[1] Reported in 67 N. W. 666.

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to be transferred and delivered to the defendant the Minnesota Commercial Company, and it was so delivered by O'Gorman, as receiver, without payment of any portion of the purchase price, in violation of the orders of the court, and that no part of the purchase price has ever been paid. The prayer for relief is an injunction restraining the Commercial Company from disposing of the property pending the action, that the transfer to it of the property be declared void, and that the property be restored to the court for the benefit of the creditors and stockholders of Seymour, Sabin & Co., and for personal judgment against the defendants O'Gorman and Searles for any deficiency. It is to be noted that no claim is made that the property did not sell for its full value. The wrong complained of is that it was delivered without first being paid for, and, further, that the plaintiff's right to maintain the action is based on the fact that he is a stockholder. The decision on a former appeal in this case is reported in 60 Minn. 42, 61 N. W. 895, to which reference is made for a more complete statement of the allegations of the complaint. A temporary injunction was issued in the case, restraining the Minnesota Commercial Company from disposing of the property pending the litigation.

When this action was commenced, another action in the same court was pending, wherein the defendant herein (O'Gorman, as receiver), was plaintiff, and the plaintiff herein (Tozer) and others were defendants, upon an undertaking, executed by them to O'Gorman, as receiver, whereby they promised and agreed that, if he would deliver to the Minnesota Commercial Company the property of Seymour, Sabin & Co., sold by him as receiver for $55,000 (being the same sale and property set out in the complaint in this action), they would pay to him, as receiver, the amount of such purchase price. The defendant Tozer (the plaintiff herein), with other defendants, answered in that action. A trial was had, resulting in a verdict (as corrected) against the defendants for the full amount of the purchase price on such sale and interest,—in all, the sum of $75,280.61. The defendants appealed to this court from an order of the district court denying their motion for a new trial, and the order was affirmed. See O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84. After the remittitur from this court was sent down, the plaintiff in this case, on his affidavit and the records, obtained, ex parte, a temporary injunction from the court commissioner, restraining the receiver from proceeding in his action

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against Tozer and others, from entering judgment on his verdict. On motion, the district court made its order dissolving the injunction. From this order the plaintiff in this action appealed.

The order was right. The principal ground, and the only one we need consider, urged by the plaintiff, why the court erred in dissolving the injunction, is that, if judgment is entered and collected in the case of O'Gorman v. Tozer and others, it will defeat this present action. Concede this, without so deciding, and it furnishes a conclusive reason why the order appealed from was properly made. The plaintiff does not seek, in this action, to protect any right he may have, as surety or otherwise, if he pays to the receiver the purchase price of the property, of the sale of which he complains in this action. But, to protect his interests as a stockholder, and that of other stockholders and creditors, he seeks by this action to have returned to the receiver the property which was not paid for on such sale. Now, if the property or its equivalent is returned or paid to the receiver, his and their interests are fully protected. There is no claim that the property did not sell for its full value, or that the defendants on the undertaking to pay the purchase price are not solvent, or that the judgment will not be paid. If it is paid, the court obtains, by means of that action, the full amount of the purchase price and interest thereon; that is, it gets everything that can be possibly obtained for stockholders and creditors in this action.

The plaintiff seeks, by his injunction, to restrain the entry and collection of a judgment against himself upon his undertaking to pay the purchase price of this property. That the verdict against him in the action of the receiver against him is legally right, and that the receiver has an absolute right to judgment against him, was finally determined by this court in the case of O'Gorman v. Sabin, supra. Neither in the complaint in this action, nor in his affidavit upon which the injunction was granted, does the plaintiff state any fact why the receiver should not enter judgment upon his verdict, except that it would defeat the present action; but, if this be true, it does not change the fact that the injunction was granted to restrain the receiver from doing just what it has been settled, by the judgment of this court, that he has the unqualified legal right to do. Every argument, legal and ethical, which was urged on the argument of this appeal, why no judgment should be entered on the verdict, was or might have been

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urged, in the case of O'Gorman v. Sabin, in support of the claim, there made, that the verdict should be set aside. The decision on the appeal in that case is conclusive of the merits of this present appeal.

Order affirmed.

CANTY, J. I concur, with this addition: That it was not intended, by the former opinion in this case, to hold that this plaintiff had an absolute right to control, in this action, further proceedings as to the alleged fraudulent sale of the corporate assets by the receiver, or that this action might not be thwarted by some action of the receiver or the court in the receivership proceedings. At the time of the former appeal, I was, and still am, of the opinion that the plaintiff had a right to bring this action to restrain the real and pretended purchasers of the assets from the receiver from disposing of the same, pending action by the receiver or the court in the receivership proceedings. And if, by such action, in such proceedings, the sale was disaffirmed, the injunction in this action might be made permanent. But if the court, in those proceedings, ratified the alleged fraudulent sale, and ordered the collection of the purchase price of the same, the plaintiff could not, by this action, prevent it; and, as far as concerns this action, the receiver, who is the mere officer of the court, may also, without any order of the court, proceed to ratify the sale and collect from the sureties on the undertaking. If he is to be prevented from doing so, it must be by an application to the court in the receivership proceedings, and not by a restraining order in this action.

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MARY A. WELTSCH v. TOWN OF STARK.[1]

June 4. 1896.

Nos. 9802—(115).

Defective Highway—Liability of Town—Direct Acts of Negligence.

A statutory town is not liable in an action by a private person for injuries sustained by him while using its highway, which were caused either by its failure to repair or by direct acts of negligence of its officers in repairing the highway. Altnow v. Town of Sibley, 30 Minn. 186, followed. Peters v. Town of Fergus Falls, 35 Minn. 549, distinguished.

Appeal by plaintiff from an order of the district court for Brown county, Webber, J., denying a motion for a new trial. Affirmed.

Somerville & Olsen, for appellant.

No reason exists for the distinction made in Russell v. Men of Devon, 2 T. R. 667, between the liability of a municipal corporation proper and that of a quasi-municipal corporation such as defendant. Statutory towns possess substantially the same rights, privileges, and duties as do municipal corporations proper. See G. S. 1894, §§ 1775, 1777, 1778. At common law no action lay against municipal corporations for failure to repair or keep in order streets and highways. 2 Dillon, Mun. Corp. § 1000; 1 Thompson, Neg. 620. Yet, by reason of the duties imposed by their charters, they are liable for neglect to repair. O'Gorman v. Village of Morris, 26 Minn. 267, 3 N. W. 349; Shartle v. City of Minneapolis, 17 Minn. 284 (308).

The reasons assigned why towns are not liable for neglecting to act or to repair are (1) want of a corporate fund, and (2) that the town is part of the government of the state. The first does not apply in this state, where towns have authority and means to make repairs. The second does not apply in cases of direct acts of negligence. Quasi-municipal corporations are liable for direct acts of negligence. Dosdall v. County of Olmsted, 30 Minn. 96, 14 N. W. 458; Peters v. Town of Fergus Falls, 35 Minn. 549, 29 N. W. 586;

[1] Reported in 67 N. W. 648.

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Township of Blakely v. Devine, 36 Minn. 53, 29 N. W. 342; Pye v. City of Mankato, 36 Minn. 373, 31 N. W. 863; 9 Am. & Eng. Enc. Law, 378, and authorites cited in note 1; 2 Dillon, Mun. Corp. § 1024.

Towns in this state have a corporate capacity as respects the laying out and opening of highways, and the supervisors are merely officers and agents of the town, and yet the town is held responsible for their acts in highway proceedings. Woodruff v. Town of Glendale, 23 Minn. 537; Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255. The work of constructing or repairing highways is not a judicial, but simply a ministerial, act, and the maxim that no one has a right to so use his own as to injure others applies to towns in highway matters. Tearney v. Smith, 86 Ill. 391.

In New York the distinction for which we contend has been made. Conrad v. Trustees of Village of Ithaca, 16 N. Y. 158; Weet v. Trustees of Village of Brockport, reported with Conrad v. Trustees; Rochester White-Lead Co. v. City of Rochester, 3 N. Y. 463; People v. Corporation of Albany, 11 Wend. 539; Elliott, Roads & S. 446, 447. See, also, Carpenter v. Nashua, 58 N. H. 37; City of Joliet v. Harwood, 86 Ill. 110; Oliver v. City of Worcester, 102 Mass. 489.

A municipal corporation is liable for negligence in placing obstructions in a street, or in performing work and making improvements on the street, to the same extent as an individual. Adams v. City of Oshkosh, 71 Wis. 49, 36 N. W. 614. An individual would be liable for the acts complained of. Beck v. Carter, 68 N. Y. 283; Dygert v. Schenck, 23 Wend. 445, 35 Am. Dec. 575; McCabe v. Town of Hammond, 34 Wis. 590.

L. G. Davis and *John Lind*, for respondent.

A town is liable for injuries caused by direct acts of negligence on the part of the road overseer in repairing a highway. Altnow v. Town of Sibley, 30 Minn. 186, 14 N. W. 877; Freeholders of Sussex v. Strader, 18 N. J. Law, 108; Hill v. City of Boston, 122 Mass. 344; Walcott v. Inhabitants of Swampscott, 1 Allen, 101; Bryant v. City of St. Paul, 33 Minn. 289, 23 N. W. 220; Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. 228; Bigelow v. Inhabitants of Randolph, 14 Gray, 541; Abbett v. Johnson County, 114 Ind. 61, 16 N. E. 127; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812.

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START, C. J. The plaintiff was injured while riding along a public highway of the defendant town, by reason of an unguarded excavation in the road which was made under the direction of the proper overseer of highways, in attempting to repair the highway. She brought this action against the town to recover damages for her injuries. When the plaintiff rested, the trial court, on motion of the defendant, dismissed her action, and she appealed from an order denying her motion for a new trial.

The sole question presented for our decision by this appeal is whether or not a statutory town in this state is liable in an action by a private person for injuries sustained by her while using its highway, which were caused by direct acts of negligence on the part of the road overseer or other officers of the town in repairing such highway. It is the settled law of this state that a private person cannot recover from a statutory town for injuries resulting from the disrepair of a public highway. Altnow v. Town of Sibley, 30 Minn. 186, 14 N. W. 877. The claim of plaintiff is that, while it must be conceded that a statutory town is not liable to a private person for injuries sustained by him by reason of the neglect of the road overseer to repair the highway, yet for his positive negligent acts in attempting to repair the highway, resulting in such injuries, the town is liable. On principle, there can be no difference between the cases, for, whether the neglect is positive or negative, the result is the same. In the one case it is a failure to repair; that is, a neglect to perform a public duty. In the other it is a failure to properly repair; that is, the negligent performance of a public duty. Both cases fall within the rule that no private action, unless given by statute, lies against a town or other municipal or quasi-municipal corporation for either the nonperformance or negligent performance of any public duty imposed on it by general statute as a governmental agent, without its request, and from the performance of which it derives no profit. Altnow v. Town of Sibley, supra; Dosdall v. County of Olmsted, 30 Minn. 96, 14 N. W. 458; Bank v. Brainerd School Dist., 49 Minn. 106, 51 N. W. 814; Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812.

The reason for the nonliability of a town to private persons for injuries resulting from the condition of its highways, as stated in

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Altnow v. Town of Sibley, is this:[2] "A town is a quasi and public corporation only, and, as such, a part of the government of the state. The duties enjoined upon it by law are enjoined upon it as a part of government, and not otherwise. They are therefore public in nature; that is to say, they are duties to the state, and not to private persons. Hence a breach of one of them creates a liability to the state only,—a public liability,—on account of which an offending town may be amenable to a public action by indictment. This is the general rule." This reason for the rule exempting towns from liability applies just as imperatively to positive acts of negligence of the officers of the town in repairing the highway as it does to their neglect to repair at all; that is, both positive and negative acts of negligence on the part of the town officers are within the reason of the rule. It is too late to discuss or criticise the rule, for it is and has been the law of this state from its beginning. To hold that the rule did not include direct acts of negligence on the part of the town officers would be to ignore the reason of the rule, and to practically repudiate the rule itself.

It is claimed, however, on behalf of the plaintiff, that the distinction contended for was recognized and sanctioned by this court in the case of Peters v. Town of Fergus Falls, 35 Minn. 549, 29 N. W. 586. That the claim is not correct becomes apparent on a simple statement of the ground on which the town was held liable in that case. The plaintiff in that case owned land adjoining the highway, and it was held that as to him, as such owner, the town owed the same duty as the law imposes upon adjacent owners of real property to each other. It had no more right to cause damage to his land in constructing or repairing the adjoining highway than any other adjacent owner would have; and, when it so constructed the culverts in the highway as to wrongfully turn the water upon his land, it violated a private duty it owed exclusively to him, as such adjacent proprietor. But in the case at bar the plaintiff seeks to charge the town with liability to herself for its neglect of the public duty, not only to repair, but to properly repair, its highways. The distinction between the cases is obvious.

Order affirmed.

[2] At page 189.

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JOHN McKASY, Assignee, v. JOSEPH P. HUBER and Others.[1]

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June 4, 1896.

Nos. 9898—(111).

Partnership—What Constitutes.

The contract set out in the opinion construed, and *held* to constitute the persons executing it general partners.

Pleading—Hypothetical Admissions.

Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all of his defenses.

Same—Partnership Contract.

Answer construed, and *held*, that it does not admit an allegation in the complaint that the defendants were partners, or the execution of a partnership contract referred to in the answer. *Held*, further, that, under the pleadings and evidence, the defendants were entitled to have the question of the execution of such contract by them submitted to the jury.

Appeal by Joseph P. Huber, H. G. Kruse and P. F. Dressel from an order of the district court for Le Sueur county, Cadwell, J., denying their motion for a new trial, after a verdict in favor of plaintiff for $577.25. Reversed.

O. J. Parker and *W. H. Leeman*, for appellants.

Thomas Hessian, for respondent.

START, C. J. This action was commenced against the appellants, Huber & Co., and Phillip Dressel, Jr., and a number of other individuals and firms, to recover from them, as partners, under the firm name of the Le Sueur Slaughterhouse Company, their proportion of $4,300.41, upon an alleged account stated between the firm and E. R. Smith & Co. The latter firm were originally the plaintiffs herein, but, since the commencement of the action, the firm made an assignment to John McKasy, who has been substituted as plaintiff.

The complaint alleges generally that the defendants were partners, and that the firm became and was indebted to the plaintiffs for

[1] Reported in 67 N. W. 650.

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money loaned, and that an account was stated between the parties. The answer of Huber & Co., a firm composed of Joseph Huber and H. G. Kruse, denies each and every allegation in the complaint, and each and every part thereof, and then alleges that the claim of the plaintiff that the answering defendants and the other persons and firms mentioned in the complaint were partners is based on an alleged written partnership contract which the plaintiffs assert was signed by such defendants, but at the time of the alleged signature of the alleged contract by the defendants the defendant Kruse was a minor. The complaint did not set out or allege any written contract of partnership, and the answer contained no direct admissions. The answer of Dressel was a general denial. Before the trial, all of the defendants, except the appellants and one other, paid their pro rata share of the account, and were released. The plaintiff had a verdict against the appellants for their share of the account. They made a joint motion for a new trial, and from an order denying their motion they appealed.

The appeal being from an order denying a joint motion for a new trial, if the order was right as to any one of the appellants, it must be affirmed as to all. Miller v. Adamson, 45 Minn. 99, 47 N. W. 452.

The plaintiff introduced a writing in these words: "We, the undersigned, agree to pay the respective amounts set opposite our names, for the purpose of erecting and building on grounds to be selected for slaughtering and dressing of hogs, cattle, sheep, etc., said sums, to be not less than $600 in all. We also agree to sign notes to borrow money, not to exceed two thousand dollars, for the purpose of carrying on said business. The management of said business shall be conducted by a superintendent and three others selected by us, and each share shall entitle the holder to one vote, and to such proportion of the net profits. In case of loss, assessment may be made not to exceed in all the amount subscribed by each. The subscriptions shall be in shares of twenty-five dollars each." Then follow names of signers and number of shares subscribed by each. There is evidence in the case tending to show that the Le Sueur Slaughterhouse Company commenced business under this contract. The instrument purported on its face to have been signed by Huber & Co. and Phillip Dressel & Son for one share each. The

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trial court correctly held that the contract constituted all persons executing it general partners. They were to share in the profits and losses in the proportion of the capital contributed by each; that is, the amount of the shares subscribed by each. The limitations contained in the contract concerned the partners only. They could not thus limit their liability as partners as to persons dealing with the firm.

This contract was written in a record book, and it was admitted that the name "Huber & Co." was written in the book by the appellant Joseph Huber, a member of the firm. But he duly offered to show that he was requested to sign his name in the book for the purpose of subscribing the sum of $25 to aid in building a slaughterhouse in Le Sueur, and did so; that the contract received in evidence was not written in the book; and, further, that, when he signed the name of his firm in the book, it contained no other writing therein than the names of certain persons and firms. This was objected to by the plaintiff, as incompetent, irrelevant, and immaterial under the pleadings. The court sustained the objection, and subsequently instructed the jury to return a verdict against Huber & Co., to which rulings they duly excepted.

The reason for these rulings was, as we gather from the record, that the answer of Huber & Co. admitted the allegations of the complaint as to the partnership of the defendants, by admitting the execution of the partnership contract. A general denial in an answer puts in issue an allegation of the complaint that the defendants are partners. The statute (G. S. 1894, § 5255) refers to allegations as to the partnership of plaintiffs, not defendants. The affirmative allegations in the answer as to the claim of the plaintiff with reference to an alleged contract cannot be construed as qualifying the general denial. The hypothetical statement or admission in the answer was only made for the purpose of pleading the defense of infancy as to one of the defendants. It is not an admission of the alleged partnership, or of the execution of the alleged contract. It is well settled that such a mode of pleading is proper to enable the defendant to plead all of his defenses. Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351. The answer of Huber & Co. put in issue the partnership as to them, and, under the general denial, they had the right to prove any fact which tended to disprove the alleged

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partnership; and the court erred in excluding their offer of evidence, and instructing the jury to return a verdict against them.

It is claimed by respondent that it conclusively appears that Huber & Co. took part in the meetings of the slaughterhouse company. We find no such conclusive evidence in the record, and are not referred to any. This aside, it is not sought to hold Huber & Co. on the ground that they had held themselves out as partners, or on account of any neglect on their part, but solely on the ground that their answer admitted the execution of the contract.

It was not claimed by the plaintiff on the trial that the appellant Dressel ever personally executed the partnership contract, but it is claimed that he authorized his brother Charles to sign the contract for him. This was denied by Dressel, who testified, in effect, that he agreed to donate $25 towards building a slaughterhouse, but that he never signed nor authorized the signing on his behalf of the contract. His brother Charles testified that he signed the name "Phillip Dressel & Son, $25," in the book, at the request of the person who was soliciting funds for a slaughterhouse, upon his brother's saying that he did not want any shares, but would donate $25. He testified that, when he so wrote the name in the book, there was no contract or writing therein except the names of persons. Joseph Huber testified on behalf of Dressel that, when he signed the firm name of Huber & Co. in the book (this was before the firm name of Dressel & Son was written therein), there was no writing in the book whatever excepting names. On the part of the plaintiff, there was evidence tending very strongly to show that these witnesses were mistaken, and that the contract was written in the book before any names were signed therein; but it is not, as respondent claims, conclusive. It was a question for the jury. But the only question the trial court submitted to the jury was whether the defendant authorized his brother Charles to sign the agreement contained in the book. The court assumed in its instructions that the contract was in the book when Charles wrote the firm name therein, and refused the request of the defendants to submit this question to the jury. This was error. The request referred to is the first special request of the defendants, which is not as clearly expressed as it might have been, but it is, in substance, sufficient.

We are also of the opinion that defendants' exception to the sub-

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mission of the question of a ratification of the partnership contract by Dressel was well taken, for the reason that the evidence did not justify the submission.

Order reversed, and a new trial granted as to all of the appellants.

JOHN HENNESSY v. ST. PAUL CITY RAILWAY COMPANY.[1]

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June 4, 1896.

Nos. 9973—(226).

Accord and Satisfaction—Evidence.

Evidence considered, and *held* that it justifies the finding and conclusion of the trial court to the effect that there was never any accord and satisfaction between the parties hereto as to the claim of the defendant against the plaintiff for damages to its property, the amount of which it assumed to deduct from his pay.

Appeal by defendant from an order of the municipal court of St. Paul, Twohy, J., denying a motion for a new trial. Affirmed.

Munn, Boyesen & Thygeson, for appellant.

Plaintiff having executed the instrument with full opportunities to examine its contents, was bound by it. Albrecht v. Milwaukee & S. Ry. Co., 87 Wis. 105, 58 N. W. 72; Dorwin v. Westbrook, 86 Hun, 363, 33 N. Y. Supp. 449; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034; Brown v. Symes, 83 Hun, 159, 31 N. Y. Supp. 629; Hinkle v. Minneapolis & St. L. Ry. Co., 31 Minn. 434, 18 N. W. 275; Webb v. Lees, 149 Pa. St. 13, 24 Atl. 169; Filler v. Tyler, 91 Va. 458, 22 S. E. 235; Riley v. Mayor of New York, 96 N. Y. 331; Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. 970; Ashley v. Hendee, 56 Vt. 209; Burns v. Walsh, 10 Misc. Rep. 699, 31 N. Y. Supp. 788.

Having accepted the amount tendered, plaintiff must be deemed to have accepted it on the terms and conditions offered, namely as

[1] Reported in 67 N. W. 635.

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complete settlement for every month during which the deductions were made. Truax v. Miller, 48 Minn. 62, 50 N. W. 935; Gall v. Dickey, 91 Iowa, 126, 58 N. W. 1075; Perkins v. Headley, 49 Mo. App. 556; Lister's A. C. Works v. Pender, 74 Md. 15, 21 Atl. 686; Maack v. Schneider, 51 Mo. App. 92; Slade v. Swedeburg E. Co., 39 Neb. 600, 58 N. W. 191; Fuller v. Kemp, supra; Brick v. Plymouth County, 63 Iowa, 462, 19 N. W. 304; Donohue v. Woodbury, 6 Cush. 148; Looby v. Village of West Troy, 24 Hun, 78; Hills v. Sommer, 53 Hun, 392, 6 N. Y. Supp. 469; Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 551, 5 Atl. 407; Sanford v. Abrams, 24 Fla. 181, 2 South. 373.

It was error to admit testimony to vary the terms of the instrument. The instrument was a contract. Cummings v. Baars, 36 Minn. 350, 31 N. W. 449; Sencerbox v. McGrade, 6 Minn. 334 (484); Wykoff v. Irvine, 6 Minn. 344 (496); Morris v. St. Paul & C. Ry. Co., 19 Minn. 459 (528); Kellogg v. Richards, 14 Wend. 116; Coon v. Knap, 8 N. Y. 402.

R. A. Walsh, for respondent.

It may be proved that a writing is without consideration, whether it be a receipt, release or contract. Bishop, Cont. § 75; Coon v. Knap, 8 N. Y. 402; Kumler v. Ferguson, 7 Minn. 351 (442); Gibson v. Pelkie, 37 Mich. 380; Hopkins v. Hinkley, 61 Md. 584; State v. Illyes, 87 Ind. 405; Chapman v. City of Brooklyn, 40 N. Y. 372; Houston v. Shindler, 11 Barb. 36; Kellogg v. Richards, 14 Wend. 116. There was no consideration. Bell v. Gardiner, 4 Man. & G. 11; Southall v. Rigg, 11 C. B. 481; Forman v. Wright, ibid; Bullene v. Blain, 6 Biss. 22, Fed. Cas. No. 2,124. There must be an actual and bona fide dispute between the parties and they must agree to bring the case within the rule of disputed claims. Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Price v. Treat, 29 Neb. 536, 45 N. W. 790; Truax v. Miller, 48 Minn. 62, 50 N. W. 935; Hammond v. Christie, 5 Robt. (N. Y.) 160.

START, C. J. This is an action to recover a balance of $23.75, which the plaintiff claims is due to him from the defendant for services rendered between January 1 and May 1, 1893. The defense is payment.

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The trial court found the following facts: "The plaintiff was employed by the defendant in the operation of its lines of railway in the said city of St. Paul during part of the year 1892, all of the year 1893, and part of the year 1894, at an agreed price per day. That during said time certain of the machinery and appliances of the defendant, used by the plaintiff, were damaged, but without fault upon his part. That on account of the injury to said property the defendant withheld of the plaintiff's wages the following sums, viz.: In January, 1893, $2.50; in May, 1893, $5; in April, 1893, $5; in March, 1893, $10; in January, 1894, $1.25,—but without consulting the plaintiff, or obtaining his consent thereto. That plaintiff signed, with others, a pay roll of the defendant, during each of said months, of which the following is a copy: 'We, the undersigned, hereby acknowledge to have received of the Twin City Rapid Transit Co. the amount set opposite our names, in full of all wages due for half month ending January 31, 1893; and we do severally assent to all deductions herein made from our check by said company for damage to its property.' That the plaintiff did not read or know the contents of said receipt, nor was the same called to his attention by any of the officers or agents of said company, when he signed it. That the plaintiff did not demand said sums so withheld during the time he was employed by defendant, being in fear of being discharged if he did so." As a conclusion of law, the court found that the payments made by defendant discharged its debt to the plaintiff pro tanto only, and ordered judgment accordingly. From an order denying its motion for a new trial, the defendant appealed.

The claim of the defendant is that the undisputed evidence and findings of fact show a contract of accord and satisfaction between the parties, as to its claims against the plaintiff for damages which it deducted from his wages. Accord and satisfaction is the discharge of a contract, or cause of action, or disputed claim, arising either in contract or tort, by the substitution of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim, and the execution of that agreement. Like any other agreement, there must be an assent to, and a meeting of the minds of both parties upon, the terms of the new agreement.

In this case, as appears from the uncontradicted evidence, there never were any negotiations between the parties in relation to any

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claim of the defendant against the plaintiff. The defendant arbitrarily, and without consulting the plaintiff, assumed to deduct certain sums from his wages. It placed this general stereotyped heading at the top of the pay roll, and then, opposite the plaintiff's name, below, and half-way down the sheet, it placed the balance, after making the arbitrary deductions, and afterwards, without calling his attention to the heading, or attempting to ascertain whether he agreed to the deductions as an accord, it presented him a check for the balance of his wages, and at the same time presented the pay roll for his signature opposite his name. He signed and accepted the check without saying a word,—without having read, and without knowing the contents of, the heading. The parties understood each other just this far: He knows why the defendant is withholding the amount from his wages. The defendant knows or supposes that he knows this fact, and assumes, as we must presume, that in view of his position he will not make any positive objection; but whether he will assent to this as accord and satisfaction of its claim against him, about which he has never been consulted, it takes no means to ascertain, but attempts to foist this heading of the pay roll upon him as an agreement to that effect, without ever having called his attention to it. Upon this state of the evidence, we are of the opinion that the trial court was justified in finding that there never was any accord between the parties as to the defendant's claims.

Order affirmed.

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TRUSTEES OF MACALESTER COLLEGE and Another v. GEORGE W. NESBITT.[1]

June 4, 1896.

Nos. 9987—(106).

Pleading—Denial of Knowledge or Information—Negative Pregnant.

A reply in these words, the plaintiff "denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer," *held* sufficient, where the objection to it was first made after trial and verdict.

Appeal by defendant from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial, after verdict in favor of plaintiffs for $901.35. Affirmed.

Savage & Purdy and *G. W. Nesbitt*, for appellant.

Keith, Evans, Thompson & Fairchild, for respondents.

START, C. J. The plaintiffs brought this action to recover from the defendant upon a contract made by him to pay to them the amount of two certain promissory notes signed by a third party. The answer alleges that the defendant, by the fraud of the plaintiff Page, was induced to enter into the contract. The plaintiffs made separate replies. The plaintiff Page, in his reply, denied each and every allegation contained in the answer, and each and every part thereof. The reply of the trustees of Macalester College, so far as here material, "denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer." On the trial the plaintiffs proved the contract declared upon and a breach thereof. The defendant offered no evidence, and the trial court instructed the jury to return a verdict for the plaintiffs, and the defendant appeals from an order denying his motion for a new trial.

The defendant claims that the reply of the trustees is defective, in that it does not deny any knowledge or information sufficient to form a belief as to the truth of any or of all of the allegations of the answer; hence, the allegations of the answer were admitted.

[1] Reported in 67 N. W. 652.

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It may be conceded that, if we are to divide "a hair 'twixt south and southwest side," as some courts have done, the denial is technically bad; but, if the attention of the trial judge had been called to the matter, he would have permitted an amendment as a matter of course; for no lawyer with any respect for himself would claim that he was misled, or that he understood, from the reply, that the allegations of the answer were admitted. No such claim is made by counsel for the defendant. The purpose of the pleader, by this reply to put in issue the new matter set up in the answer, is perfectly manifest; and the objection that the reply is technically insufficient is made by the defendant for the first time in this court. The objection comes too late. We hold the reply sufficient as against any objections to it made for the first time after the trial and verdict.

Order affirmed.

SAMUEL D. PETERSON v. WESTERN UNION TELEGRAPH COMPANY.[1]

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June 4, 1896.

Nos. 9998—(108).

Libel—Telegram—Malicious Publication.

The defendant received at its office at New Ulm a message directed to the plaintiff, at St. Paul, in these words: "Slippery Sam, your name is pants. [Signed] Many Republicans." It forwarded the message over its wires to its operator at St. Paul, who there wrote it down, placed it in a sealed envelope, and caused it to be delivered to the plaintiff. *Held*, that the message, on its face, was susceptible of a libelous meaning, and that the evidence was sufficient to justify a finding by the jury that the defendant maliciously published the libel.

Same—Excessive Verdict.

Held, further, that a verdict against the defendant for $5,200 damages for such publication is so excessive as to justify the conclusion that the verdict was the result of passion and prejudice.

Appeal by defendant from an order of the district court for Brown county, Webber, J., denying a motion for a new trial. Reversed.

[1] Reported in 67 N. W. 646.

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Ferguson & Kneeland, for appellant.

The words were not libelous per se. If they had a peculiar meaning at New Ulm, it is immaterial, since such meaning was not known to the operator there or to the operator at the other end of the line. Hankinson v. Bilby, 16 M. & W. 442; Shull v. Raymond, 23 Minn. 66. Even if in sending the telegram the New Ulm operator, though not legally excusable, was acting under a mistaken sense of duty, this is a case "at most for only compensatory and not for vindictive damages." Wiggin v. Coffin, 3 Story, 1, Fed. Cas. No. 17,624. Punitive damages are not to be inflicted except for actual malice. Hoffman v. Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312. And malice of agent is not imputable to principal. Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Wardrobe v. California Stage Co., 7 Cal. 118; Hill v. New Orleans, O. & G. W. R. Co., 11 La. An. 292; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; 1 Sedgwick, Dam. § 378, and note. It is the duty of court to control the action of the jury in rendering excessive verdicts. Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127; Dillon, Laws & Juris. of Eng. & Am. 130; Pratt v. Pioneer P. Co., 32 Minn. 217, 18 N. W. 836, and 20 N. W. 87; Bridge v. City of Oshkosh, 71 Wis. 363, 37 N. W. 409. Exemplary damages cannot be recovered where the damages are at most nominal. Stacy v. Portland Pub. Co., 68 Me. 279.

It is within the power, and is the duty, of the court to set aside an excessive verdict in a suit for libel or other tort as in any other action. Templeton v. Graves, 59 Wis. 95, 17 N. W. 672; Duffield v. Tobin, 20 Ga. 428; Young v. Hairston, 3 Dev. Law, 55; Nettles v. Harrison, 2 McCord, 230; Burkett v. Lanata, 15 La. An. 337, cited in 1 Sedgwick, Dam. § 388. Purely vindictive damages may be so extravagant as to warrant the setting aside of a verdict. 1 Sedgwick, Dam. § 388; McCarthy v. Niskern, 22 Minn. 90; Woodward v. Glidden, supra; Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68; Ritchie v. Holbrooke, 7 Serg. & R. 458; Cottle v. Cottle, 6 Greenl. 140; Cilley v. Bartlett, 19 N. H. 312; Burke v. McDonald, 2 Idaho, 1022, 29 Pac. 98.

There was no publication by defendant. The fact that there is no precedent for such a claim raises a strong presumption against it.

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Russell v. Men of Devon, 2 T. R. 667, per Ashhurst, J.; Altnow v. Sibley, 30 Minn. 186, 14 N. W. 877. See, also, Francis v. Western U. Tel. Co., 58 Minn. 252, 59 N. W. 1078. In the case of husband and wife, there can be no publication of a libel by one to the other. Sesler v. Montgomery, 78 Cal. 486, 21 Pac. 185; Wennhak v. Morgan, L. R. 20 Q. B. Div. 635. See Scott & Jarnagin, Law of Telegraphs, §§ 138, 138a.

A telegraph company has no right of election as to the transmission of messages. It cannot refuse to transmit any message couched in proper language because of its supposed illegal, immoral or otherwise improper purpose. Gray v. Western U. Tel. Co., 87 Ga. 350, 13 S. E. 562; 35 Am. & Eng. Corp. Cas. 47–50; Western U. Tel. Co. v. Ferguson, 57 Ind. 495; G. S. 1894, §§ 2635–2641; Penal Code, § 482, G. S. 1894, § 6782; Primrose v. Western U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098.

It is not easy very precisely to define what is and what is not a privileged communication. Wenman v. Ash, 13 C. B. 836, cited in Townshend, Sland. & L. § 209. See Marks v. Baker, 28 Minn. 162, 9 N. W. 678; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Townshend, Sland. & L. §§ 120, 208, 209; Rector v. Smith, 11 Iowa, 302; Taylor v. Hawkins, 16 Q. B. 308. A publication fairly made by a person in the discharge of some public or private duty, whether legal or moral, comes within the class of privileged and authorized communications. Baron Parke in Toogood v. Spyring, 1 Crompton, M. & R. 181, cited in Marks v. Baker, supra, and in Moore v. Butler, 48 N. H. 161; Aldrich v. Press Printing Co., 9 Minn. 123 (133); Bishop, Non-Cont. Law, §§ 302, 303.

Plaintiff does not make out a case of libel. The publication, if any, was of spoken words, and the cause of action, if the words were defamatory, would be for slander. Townshend, Sland. & L. §§ 98, 108.

S. L. Pierce, for respondent.

The telegram was libelous. Newell, Defam. 304; Townshend, Sland. & L. § 130. The only question for the court is whether the words are capable of the defamatory meaning attached to them. The jury are to determine the true meaning. Newell, Defam. 304;

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Pratt v. Pioneer Press Co., 30 Minn. 43, 14 N. W. 62; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Parmiter v. Coupland, 6 M. & W. 105; Bergmann v. Jones, 94 N. Y. 51. No evidence was necessary to prove the meaning of the language. Gribble v. Pioneer Press Co, 37 Minn. 277, 34 N. W. 30. See More v. Bennett, 48 N. Y. 472; Townshend, Sland. & L. §§ 339, 344; Barrett v. Long, 8 Irish Law Rep. 331. If the language admits of a harmless as well as injurious meaning, which is the meaning to be attached to it will be resolved by the verdict of the jury. Townshend, Sland. & L. § 143; Newell, Defam. 303–4; Hamilton v. Eno, 81 N. Y. 116.

Malice in law does not necessarily imply the existence of malevolent feelings, but any wrongful act injurious to another, done intentionally, without just cause or excuse, the law deems to be malicious. Malice in fact implies a desire and intention to injure. The term express malice originated in the practice of requiring the plaintiff to prove malice by evidence other than implication when the words spoken or printed are, prima facie, privileged. Townshend, Sland. & L. § 60; Folkard's Starkie, Sland. & L., with Wood's notes, 398, n. 2; Bromage v. Prosser, 4 B. & C. 247; Wills v. Noyes, 12 Pick. 324, adopted in Lynd v. Picket, 7 Minn. 128 (184); Wilson v. Noonan, 35 Wis. 321; Gardner v. Minea, 47 Minn. 295, 50 N. W. 199. Evidence may be introduced showing actual malevolence, or it may be found from the character of the publication, as was done in the following cases: Tillotson v. Cheetham, 3 Johns. 56; White v. Nicholls, 3 How. 266; Bergmann v. Jones, 94 N. Y. 51; Evening News Assn. v. Tryon, 42 Mich. 549, 4 N. W. 267. See, also, Newell, Defam. 324.

A libel recklessly or carelessly published, as well as one induced by personal illwill, will support an award of punitive damages. Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701; Morning Journal Assn. v. Rutherford, 1 U. S. App. 296, 2 C. C. A. 354, and 51 Fed. 513; Sun Printing Assn. v. Smith, 14 U. S. App. 173, 5 C. C. A. 91, and 55 Fed. 240; Post Pub. Co. v. Hallam, 16 U. S. App. 613, 8 C. C. A. 201, 59 Fed. 530.

At common law, in actions for damage sounding in tort, the court will not grant a new trial on account of excessive damages "unless

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it appears that they are flagrantly outrageous and extravagant." Clerk v. Udall, 2 Salk. 649; Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, and 20 N. W. 87; 2 Thompson, Trials, § 2067.

While the gist of the action is malicious injury to the reputation, this injury is not necessarily the actual impairment of the plaintiff's reputation, but rather the assault upon it by the calumniator, whereby the plaintiff is caused to suffer indignity, or mental distress, which is a recognized element of actual damage, whether it is pleaded or not. Chesley v. Tompson, 137 Mass. 136; Wilson v. Noonan, supra; Simons v. Burnham, 102 Mich. 189, 60 N. W. 476; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; Warner v. Press Pub. Co., supra; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Townshend, Sland. & L. § 391.

As to exemplary damages see: Goddard v. Grand Trunk Ry., 57 Me. 202; Malloy v. Bennett, 15 Fed. 371.

START, C. J. This is an action for libel, in which the plaintiff recovered a verdict for $5,200, and the defendant appealed from an order denying its motion for a new trial.

The defendant on January 19, 1893, received at its office in New Ulm, from Albert Blanchard, a message for transmission over its telegraph line to St. Paul, which read thus: "New Ulm, Minn. 1–19, 1893. To S. D. Peterson, Care Windsor, St. Paul, Minn.: Slippery Sam, your name is pants. [Signed] Many Republicans." The New Ulm operator sent the message over the wires to St. Paul, where it was taken from the wire by the operator, and delivered to the plaintiff in a sealed envelope bearing his address as stated in the message.

The record presents three questions for our consideration: (1) Was the message a libel, or fairly susceptible, on its face, of a libelous meaning? (2) Was the evidence sufficient to justify the jury in finding that the defendant maliciously published the supposed libel? (3) Are the damages awarded so excessive as to justify the conclusion that the verdict was the result of passion and prejudice? We answer each of the questions in the affirmative.

1. The message was, on its face, fairly susceptible of a libelous meaning. The sting is in the word "slippery." This word, when used as descriptive of a person, has a well-understood meaning. It

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means, when so used, that the person to whom it is applied cannot be depended on or trusted; that he is dishonest, and apt to play one false. Century Dict. If such is the meaning of the word as used in this message,—and of this the jury were the judges,—it was clearly libelous, because, if a man is dishonest, and apt to play one false, he merits the scorn and contempt of all honorable men. To falsely publish of a man that he is slippery tends to render him odious and contemptible. Such a publication is a libel. Wilkes v. Shields, 62 Minn. 426, 64 N. W. 921.

2. The question whether or not the defendant maliciously published the libel is one of some doubt, but we are of the opinion that it was a question for the jury, under the evidence.

Technically, the defendant published the libel when it communicated it to its operator at St. Paul, but whether such publication was wrongful (that is, actionable) depends on the further question whether or not it was privileged. The defendant was a common carrier, and was bound to transmit all proper messages delivered to it for that purpose, but it was not bound to send indecent or libelous communications. Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant cannot be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such a case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly, and forward the message without delay, if it is a proper one, and for any honest error of judgment in the premises the telegraph company cannot be held responsible. But where the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is forwarded under such circumstances as to warrant the jury in finding that the operator, in sending the message, was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel. A publication under such circumstances is not privileged. The evidence in this case was such that a finding either way on the question whether the defendant maliciously published this libel would not be disturbed by the court. Whether this question was correctly submitted to the jury on the

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trial of this case, we need not inquire; for there must be a new trial on another ground, and, if there was such error, it is not likely to occur on the next trial.

3. The damages in this case are so excessive as to conclusively show that the verdict was the result of passion and prejudice. Courts should interfere with an assessment of damages by a jury with great caution, and sustain the verdict unless it appears that it was the result of passion or prejudice. But the verdict in this case admits of no defense. As correctly stated by the trial court in its instructions to the jury, the sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were limited to such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal and exposing himself to serious punishment, and that there is no evidence to justify the inference that the contents of the message ever reached the public, except through the plaintiff, a verdict assessing his damages at $5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice.

The trial court seems to have regarded the damages so excessive as to justify a new trial, except for the fact that this is the second verdict in the case, and that one reason for setting aside the former verdict was that the damages were excessive. As a rule, the court will not set aside a second verdict on account of excessive damages, but where, as in this case, the verdict is controlled by no reason, supported by no justice, and is manifestly the result of passion and prejudice, it is the duty of the court to set it aside, no matter how many similar verdicts may have been previously returned in the case.

Order reversed, and a new trial granted.

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EMIL MALMGREN and Others v. ALBERT S. PHINNEY and Others.[1]

June 4, 1896.

Nos. 10,002—(134).

Appeal from Judgment Modified on Appeal.

The result of a former appeal herein from the original judgment was to remand the case to the district court, with directions to modify the judgment in certain particulars; and it was so modified. *Held*, that an appeal lies from the judgment as modified, although the time for appealing from the original judgment had expired when this appeal was taken; but *held*, further, that no matters can be reviewed on this appeal which were or might have been reviewed on the appeal from the original judgment.

Assignment of Error—Sufficiency.

The trial court, by its judgment, made several separate and distinct directions as to the application of the proceeds from the sale of the real estate to the payment of the several lien claimants. *Held*, that a general assignment of error, that the court erred in directing the application of the proceeds of the property, is insufficient to call in question the correctness of the judgment as to the order of the sale of the real estate, or as to the application of the proceeds thereof.

New Trial—Newly-Discovered Evidence.

Held, that the trial court properly exercised its discretion in denying a motion for a new trial, on the ground of newly-discovered evidence.

Appeals by defendants Charles J. Berryhill and others from an order of the district court for Ramsey county, Kelly, J., and also from a judgment. Affirmed.

Hiram F. Stevens and *Charles J. Berryhill*, for appellants.

Humphrey Barton, *W. H. Yardley*, *O. J. Cook*, and *James H. Barnard*, for respondents.

START, C. J. This is an action to enforce mechanics' liens, and this is the second appeal in the case. The decision of this court on the first appeal is reported in 50 Minn. 457, 52 N. W. 915, to which we refer for a full statement of the facts and the judgment originally appealed from by the present appellants. The result of the first appeal was that this court remanded the case to the dis-

[1] Reported in 67 N. W. 649.

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trict court, with directions to modify the judgment in accordance with the views of this court, expressed in its opinion. After the mandate of this court was filed in the district court, the plaintiffs and other lien claimants moved the latter court, on notice, to modify its original judgment so as to conform to such mandate. At the same time, the appellants Berryhill, Davison, and Resser made a motion for a new trial, on the ground of newly-discovered evidence. The motion for a new trial was denied, and the motion to modify the judgment was granted, and the judgment modified accordingly. The appellants appeal from the judgment as modified; also, from the order denying their motion for a new trial.

1. The respondents claim that the appellants have no right of appeal from the modified judgment, because the time for appealing from the original judgment had expired when the present appeal was taken. In fact, the time for appealing from the original judgment expired before it was modified; hence, if the claim is correct, a party might secure a material modification of a judgment after the time for appealing from it had passed, and there could be no appeal from the judgment as modified. An appeal lies from a judgment modifying a former judgment in the same case, although the time for appealing from the original judgment has expired. The decision on the former appeal herein is, however, conclusive on the appellants on this appeal as to all matters which were or might have been reviewed on the appeal from the original judgment.

The only modification of the original judgment directed by this court was with reference to the order of priority of the liens of the several claimants and mortgagees, and the portions of the lots upon which their respective liens rested. The manner of the sale—that is, the order of sale of the several parcels of the lot—was left for the consideration of the trial court. The district court, by its modified judgment, decreed that the lot should be sold in three parcels, in the order following: First, the south 40 feet thereof; second, the north 20 feet of the south 60 feet; and, third, the north 104 feet thereof,—and also directed the application of the proceeds of the sale in accordance with the order of the priority of the respective liens on the several parcels.

The appellants' fourth and fifth assignments of error relate exclusively to matters which were in the original judgment, and as to

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which no modification was directed by the decision on the former appeal, and none was made by the judgment as modified. Such matters cannot be reviewed on the present appeal.

The only other assignment of error relating to the judgment is in these words: "The court erred in directing the application of the proceeds of the property." From the brief and argument of counsel for appellants, it is apparent that the alleged error of which he complains was in the direction of the trial court as to the order in which the several parcels of the lot should be sold. This assignment of error is insufficient to present any question for review either as to the order of sale or the application of the proceeds from the sale of such parcels. There were some seven distinct and separate directions as to the application of such proceeds to the several claimants. The particular direction for the application of the proceeds with respect to which error is claimed should have been specified. Smith v. Kipp, 49 Minn. 119, 51 N. W. 656; Moody v. Tschabold, 52 Minn. 51, 53 N. W. 1023; Dallemand v. Swensen, 54 Minn. 32, 55 N. W. 815.

2. The motion for a new trial is based upon newly-discovered evidence; that is, upon the discovery of the fact that the defendant Peterson, the former owner of the north 20 feet of the south 60 feet of the lot in question, conveyed his interest therein, before the commencement of this action, to a person not a party to this action, but the deed was not recorded until after he was made a defendant herein. It appeared on the hearing of the motion that one of the appellants (Resser) has acquired, by a foreclosure of his mortgage, title to Peterson's 20 feet of the lot, and that the latter's grantee has now no interest therein. The present owner is and has been a party to this action from its commencement. The appellant Berryhill, an attorney for the other appellants, discovered the fact that Peterson had conveyed his interest in the lot in September, 1892. The motion was made in June, 1895, and it is clear that the trial court properly exercised its discretion in denying the motion for a new trial.

Judgment and order affirmed.

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HASTINGS MALTING COMPANY and Others v. IRON RANGE BREWING COMPANY and Others.[1]

June 4, 1896.

Nos. 10,028—(121).

Manufacturing Corporation—Brewing Company—Stockholders' Liability.

The general nature of the business of the defendant corporation, as declared by its articles of incorporation, is the manufacture or brewing of lager beer, and selling and disposing of the same, together with such other business as may be incidental thereto. *Held*, that it is exclusively a manufacturing corporation, and its stockholders are not liable for its debts beyond the amount due on their stock subscriptions.

Stockholders' Liability — Payment in Property — Overvaluation — Fraud.

A corporation, unless prohibited by some constitutional or statutory provision, may, in good faith, issue paid shares of its stock for the purchase of property at a fair valuation; and in such case both the corporation and its creditors will be bound thereby. But if there is a material overvaluation of the property, to the knowledge of the contracting parties, the transaction is fraudulent as to subsequent creditors of the corporation without notice; and, if it becomes insolvent, the shareholders so paying for their stock will be charged in favor of such creditors with the difference between the real value of the property and the par value of their stock.

Same—Finding not Sustained.

Evidence considered, and *held*, that it does not sustain a finding of the trial court to the effect that a sale by the defendant corporation of full-paid shares of its stock for property received by it, at a material overvaluation, was made in good faith, and was not fraudulent as to subsequent creditors.

Appeal by plaintiff and the intervening creditors of defendant brewing company from an order of the district court for St. Louis county, Charles L. Lewis, J., denying a motion for a new trial. Reversed.

Schmidt, Reynolds & Mitchell, for appellants.

The corporation was authorized not only to manufacture malt beer, but to sell and dispose of the same, and there is hence a double

[1] Reported in 67 N. W. 652.

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liability, as provided by Oswald v. St. Paul Globe Pub. Co., 60 Minn. 82, 61 N. W. 902; First Nat. Bank v. Winona Plow Works, 58 Minn. 167, 59 N. W. 997. There was such overvaluation as amounts to legal fraud. Boynton v. Andrews, 63 N. Y. 94; Hospes v. Northwestern Mnfg. & Car Co., 48 Minn. 174, 50 N. W. 1117; Boulton C. Co. v. Mills, 78 Iowa, 460, 43 N. W. 290; Boynton v. Hatch, 47 N. Y. 225; Douglass v. Ireland, 73 N. Y. 100; First Nat. Bank v. Gustin M. C. M. Co., 42 Minn. 327, 44 N. W. 198; Gogebic Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427, 47 N. W. 726; Thompson, Corp. §§ 1562, 1563. The corporation has no power to issue stock for less than par. Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201; Boynton v. Andrews, supra. The effect of this rule is that shareholders who purchase their shares at less than par will, in the event of its insolvency, be liable to make good to its creditors the difference between its par value and the price at which it was issued to them. Thompson, Corp. §§ 1562, 1566, 1567, 1568; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476; Upton v. Tribilcock, 91 U. S. 45; McAvity v. Lincoln Pulp & Paper Co., 82 Me. 504, 20 Atl. 82; Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521. Stockholders in America are trustees for creditors. Thompson, Corp. § 1573. The shareholder must pay money or money's worth. Thompson, Corp. § 605; Liebke v. Knapp, 79 Mo. 22; Libby v. Tobey, 82 Me. 397, 19 Atl. 904; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680; Thompson, Corp. §§ 1606, 1607, 1608, 1609; Boynton v. Hatch, supra; Sickels v. Morton, 44 Hun, 623; Marshall Foundry Co. v. Killian, supra; Tallmadge v. Fishkill Iron Co., 4 Barb. 382; Elyton L. Co. v. Birmingham W. & E. Co., 92 Ala. 407, 9 So. 129; Libby v. Tobey, supra; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; Farmers' Bank v. Gallaher, 43 Mo. App. 482; Boulton C. Co. v. Mills, supra; Douglass v. Ireland, supra; Osgood v. King, 42 Iowa, 478. In the case at bar, where the property was of such a nature that its value was well known and understood, or capable of being estimated, or easily ascertained, and was taken at an exorbitant estimate, it raises the presumption of fraud, and this presumption is conclusive unless it is rebutted by evidence which fully explains it. 23 Am. & Eng. Enc. Law, 860, note 2; Elyton L. Co. v. Birmingham W. & E. Co., supra; Douglass v. Ireland, supra; Jackson v. Traer, 64 Iowa, 469, 20 N. W. 764; Boynton v. Hatch, su-

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pra; Chisholm Bros. v. Forny, 65 Iowa, 336, 21 N. W. 664; New Castle N. Ry. Co. v. Simpson, 21 Fed. 533; Libby v. Tobey, supra; Boulton C. Co. v. Mills, supra; National Tube Works Co. v. Gilfillan, 26 N. E. 538.

White & McKeon, for respondents.

In the absence of a stock subscription or of a statute upon the subject, persons receiving full paid shares of a company for property accepted at an over-valuation cannot be held liable by the corporate creditors for the difference between the real value of the property and the valuation at which the company agreed to accept it. Boynton v. Hatch, supra; Boynton v. Andrews, supra; Van Cott v. Van Brunt, 82 N. Y. 535; Schenck v. Andrews, 57 N. Y. 133; Ross v. Kelly, 36 Minn. 38, 29 N. W. 591, and 31 N. W. 219; Phelan v. Hazard, 5 Dill. 45, Fed. Cas. No. 11,068; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Coit v. North Carolina G. A. Co., 14 Fed. 12, 119 U. S. 343, 7 Sup. Ct. 231; Bank v. Alden, 129 U. S. 372, 9 Sup. Ct. 332; Peck v. Coalfield Coal Co., 11 Ill. App. 88.

START, C. J. This action was brought by the plaintiff, on behalf of itself and all other creditors, against the defendant corporation and its stockholders, to enforce their alleged constitutional liability for the corporate debts, and to collect, and apply in payment of the claims of creditors, an alleged unpaid balance due upon the stock of the defendant stockholders; that is, the difference between the par value of their stock and the actual value of the property transferred to the corporation in full payment of stock issued to them. The defendant stockholders, by their answer, denied all liability in the premises. The trial court, on its findings of fact, ordered judgment for the defendants, and the plaintiff appeals from an order denying its motion for a new trial.

The material findings of the trial court are, in substance, as follows:

Defendant Iron Range Brewing Company is a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, and was organized and its nature of business was as set forth in its articles of incorporation, as follows: "The general nature of the business of this corporation shall be the manufacture or brewing of lager beer and other malt liquor, and to sell and dispose of the

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same, together with such other business as may be incidental thereto." It was so incorporated on or about June 22, 1892; and, by its articles of incorporation, the time for commencement of its incorporation was and is July 1, 1892, and to continue for a period of thirty years. By its articles of incorporation, the capital stock was fixed at $30,000, divided into 600 shares of $50 each. On July 1, 1892, on the day of the date of incorporation, Michael Fink, Catherine Fink, and the defendant Philip M. Graff were partners, under the firm name of M. Fink & Co., and were the owners of a brewery property at Tower, Minnesota, including all the personal property and paraphernalia, machinery, and manufactured stock and material on hand, good will, and trade secured for the business of such brewery, which property was on that date of the actual worth and value of $18,000. On that day, the firm of M. Fink & Co. sold and transferred the property to the defendant Iron Range Brewing Company, and there were issued to them, in consideration of the transfer, the 600 shares of the capital stock of the corporation as fully paid up, as follows: 588 shares to the defendant Philip M. Graff; 8 shares to the defendant Finley H. Frisbee; 2 shares to the defendant Robert P. Paine; 2 shares to Michael Fink. No other consideration was given for the stock, and no other payments were ever made thereon. The stock was so issued on July 1, 1892, and the parties named are the owners and holders thereof, and have ever since been the owners and holders thereof. The sale of the stock to the defendants in consideration of the property was made in good faith by the defendants, and without any intent to defraud or deceive any of the plaintiffs in this action, or any prospective creditor of the corporation. The defendant corporation is insolvent, and, before the commencement of this action, the plaintiff recovered judgment against it for the amount of its claim, and execution was duly returned unsatisfied. Other creditors have become parties to this action, and have proved their claims. The debt of the plaintiff and of all of the creditors was contracted after such stock was issued as fully paid.

1. The plaintiff's first claim is that the defendant corporation is not a manufacturing corporation, and therefore its stockholders are liable for the corporate debts to the amount of their stock. Its articles of incorporation show that it is a manufacturing corporation. This is apparent on a mere inspection of them. They only authorize the corporation to engage in the business of manufacturing lager beer and other malt liquors, and selling the same, together with such other business as may be incidental thereto. The entire business which the corporation is authorized to engage in is manufacturing, disposing of its product, and such incidental business as may be reasonably necessary for effectuating the purposes of its organization. The case of First Nat. Bank of Winona v. Winona Plow Co.,

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58 Minn. 167, 59 N. W. 997, is not in point, for in that case the corporation was authorized to purchase and sell plows and farming implements, as well as to manufacture them.

2. Are the findings and conclusion of the trial court, to the effect that the sale of the property in this case to the corporation for paid-up stock was made in good faith, without any intent to defraud creditors, and that it cannot therefore be questioned by them, sustained by the evidence? This is the real question in the case, and we answer it in the negative.

The question as to the liability of stockholders who have received full-paid shares of a corporation without in fact having paid in full for them, or who have received them in exchange for property at an overvaluation, to subsequent creditors of the corporation, is one upon which the adjudged cases are in conflict. In some of the cases the conflict is apparent only, for the diversity in the conclusions reached is the result of a difference in the statutes under which the corporations were organized; but all of the cases cannot be thus reconciled. We are, however, relieved from any extended discussions of the law of this case by reason of the principles laid down in the previous decisions of this court.

In the case of First Nat. Bank of Deadwood v. Gustin M. C. M. Co., 42 Minn. 327, 44 N. W. 198, it was held that where the stock of a corporation was issued as fully paid up, without in fact having been paid to its full par value, equity will hold the shareholders liable for the amount not actually paid, in favor of creditors who can be presumed to have given credit to the corporation in reliance upon its apparent paid-up capital. The matter was further examined and fully discussed in the case of Hospes v. Northwestern Mnfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, wherein it was held that the right of creditors to compel holders of stock not paid for to pay for it, contrary to their agreement with the corporation, rested neither on implied contract nor upon the "trust fund" doctrine, but upon the ground of fraud. The rule and the reason for it, as stated in the opinion, are substantially that the capital of a corporation is the basis of its credit, and a substitute for the personal liability of those who own its stock. People deal with the corporation and give it credit on the faith of its stock, and they have a right to assume that it has a paid-in capital to the amount which it represents itself as

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having. If the representation is false, it is a fraud on creditors; and, in case the corporation becomes insolvent, equity will compel the holders of bonus stock, or stock not in fact paid in full, to make the representation good, by paying the balance due on their stock to the extent necessary to pay creditors whose debts were contracted subsequent to the issuing of the stock as fully paid, and who are presumed to have relied on the representation. It is the misrepresentation of fact in stating the amount of capital to be greater than it is in fact which is the basis of the liability of the stockholders in such cases.

In principle, it can make no difference whether the stock issued as paid up is bonus stock, pure and simple, or whether it was sold for cash for less than its par value, or for property at a gross overvaluation. In the first two cases the question of fraud would be one of law, for on the issuing by the corporation of its stock as paid, and its acceptance by the stockholders, when in fact nothing was ever paid for it, or where a sum of money less than its par value was paid and accepted for it, there is no opportunity for a mistake or error of judgment; and such stockholders cannot be heard to say, after creditors have trusted the corporation on the basis of its apparent paid-up capital, and the corporation has become insolvent, that they acted in good faith, without any intention to defraud any creditor. The law presumes an intention in such cases to defraud. Where property at a gross overvaluation is given and accepted for paid-up stock, the question of fraud is usually one of fact. But there may be cases where the property was of such a character, and the overvaluation so great, as to exclude any possibility of an honest mistake. In such cases it would be the duty of the court to declare the transaction fraudulent as to creditors. Upon principle and authority, we hold that a corporation, unless prohibited by some statutory or constitutional provision, may in good faith issue paid-up shares of its stock for the purchase of property at a fair valuation; and in such case both the corporation and its creditors will be bound thereby. But if there is a material overvaluation of the property, to the knowledge of the contracting parties, the transaction is a fraud as to subsequent creditors of the corporation without notice; and, if it becomes insolvent, the shareholders so paying for their stock will be charged, in equity, to the extent necessary to

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pay such creditors, with the difference between the real value of the property and the par value of their stock. Hospes v. Northwestern Mnfg. & Car. Co., 48 Minn. 174, 50 N. W. 1117; 2 Morawetz, Priv. Corp. § 825; Taylor, Corp. § 545; 23 Am. & Eng. Enc. Law, 858.

In the practical application of this rule, it must be kept in mind that fraud, actual or constructive, is the basis of the stockholders' liability to the creditor. On the one hand, the value of the property is to be determined, not from subsequent events, but as of the time of the transaction, and from the situation, nature, and condition of the property as they honestly appeared to the parties at the time. Although there was in fact an overvaluation of the property, it will not render the stockholders liable for the deficiency if it was the result of an honest mistake or error of judgment. On the other hand, where the nature and condition of the property are such that its value is well known and understood, or is capable of being readily estimated and ascertained, and the property is transferred to the corporation at a gross overvaluation for paid-up shares, the transaction is prima facie fraudulent as to subsequent creditors, and as against them the burden is upon the shareholder to rebut the presumption by clear and satisfactory evidence. If he knew or ought to have known that he was paying for his stock in property at a material overvaluation, it will not be sufficient for him to show, as a mental operation, that he did not intend to defraud any one. He must go further, and show that, in the exercise of ordinary business sense, he was justified in believing, and did honestly believe, that the property was being turned in at a fair valuation. Where the facts are undisputed, and the overvaluation so great as to show that the stockholder ought to have known it if he had exercised ordinary business prudence, his actual belief or intention in the premises will not avail him; he will be presumed to have intended the reasonable and natural consequences of his act, which is to defraud creditors in case of the insolvency of the corporation.

An examination of the evidence in this case in the light of these suggestions shows that the finding of the trial court, to the effect that the sale of the property in question to the corporation for paid-up shares of its capital stock was made in good faith, is manifestly against the evidence.

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The value of the property at the time of the transaction, as found by the court, was only $18,000. This, under the evidence, was a very liberal estimate. The title of the property was originally in the name of the firm, M. Fink & Co.; yet, for all practical purposes, the defendant Graff was the owner of it, for he was a member of the firm, and had furnished the money which built the brewery, and bought the property sold to the corporation. The building of the brewery was commenced in the fall of 1891, and in June, 1892, shortly after the brewery was completed and equipped for business, the real owner of the property entered into an agreement with three other persons, who were without capital, so far as appears, to organize a corporation to purchase the property for the stock of the corporation. The corporation was organized by these persons with a capital of $30,000. Paid-up stock to the amount of $30,000 was then issued by the corporation in payment of the property, which was worth only $18,000; that is, the property was taken by the corporation at an overvaluation of 66⅔ per cent., or, in other words, the stock was issued as paid up for property worth 40 per cent. less than the par value of the stock. The property was of such a nature that its real value could be readily estimated and ascertained. The building had been erected, and the machinery, fixtures, and appliances of the business purchased, only a short time previously. Under these circumstances, the overvaluation was so gross as to raise, unexplained, a conclusive presumption of fraud, and justify the conclusion that the transaction was not bona fide, but a mere device to obtain paid-up stock for not more than 60 per cent. of its par value,—a stock-watering scheme.

It would seem that the corporation and the defendant Graff knew, or must have known, that the property was turned in at a very material overvaluation. To assume that he did not know this would be an impeachment of his intelligence. The burden, then, rested on him to rebut the presumption of fraud by clear and satisfactory evidence. We are of the opinion that he failed to do so. He testified that he put into the property $20,000 to $24,000; that it was considered reasonably worth $30,000; that it was worth that sum; and that there was no intent or thought of fraud on his part or of the corporation. He also testified that the land on which the brewery stood was put in at $3,000, and was worth it, but admits that it was

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donated practically to his firm. On his examination, he testified with reference to the cost of the property as follows:

"Q. Have you the ledger, daybook, journals, or any other book belonging to this corporation? A. I have not. Q. Where are they? A. They are at Tower, I presume. Q. You knew of the fact that you were required to produce them here, did you not? A. I did not, sir. Q. Your attorney was aware of that? By Mr. White: We did not have them. The assignee had them. He held the accounts. By Mr. Schmidt: Q. How much did you pay Mr. Fink for that ground? A. I couldn't tell you now. Q. Do you know how much you paid for putting up the so-called 'cellar,'—the ice house? A. No, sir; I do not. Q. Do you know how much you paid for putting up the brewery property itself? A. No; I do not. Q. Who did you buy the machinery of? A. The machinery was bought indirectly from some brewing company down at Minneapolis. Q. It was bought secondhand? A. Part of it. The man told me it was worth $3,000, but we got it for less than that, I think. I don't recall the exact amount. Q. You paid $1,800 for it? A. I don't remember the exact price. Q. Isn't that the exact price? A. I don't remember. Q. Isn't that about it? A. I don't recall the exact price. I know the man told me it was worth $3,000. Q. Is it not a fact that you bought it for $1,800? A. It was just as good as new. Q. And you paid $1,800? A. I don't remember without refreshing my memory from the book. Q. Now, that brewery building itself is an ordinary barn building, isn't it? A. It is an ordinary building, but it cost as much as a brick building. Q. You don't know how much it did cost? A. I know it cost me $24,000, the whole business. Q. It was running at a loss? A. No, sir; only at the very latter part, when the bookkeeper stole everything. Q. You had a bookkeeper in there that stole $3,000? A. Yes; he stole something like that. Q. That is included in the $24,000? A. I put it all in— I suppose that is where part of it went. Q. So there was $3,000 that the bookkeeper got away with, and that you put in? A. I furnished all the money that went in. Q. Now, Mr. Graff, prior to the time that you actually incorporated, how much money had you actually put into that property? A. Over $20,000."

There was no other witness on the part of the defense as to the value of the property or the good faith of the transaction. Any comment on the defendants' evidence would seem to be unnecessary. It cannot be held to rebut the presumption of fraud arising from the known gross overvaluation of the property. It is suggested on behalf of the defendants that the transaction was spread out on the records of the corporation, and, if subsequent creditors had examined the records before trusting it, they would have ascertained just the consideration paid for the stock. As to third parties, the record books of a corporation are private, and such persons are not charged

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with knowledge of matters therein recorded. Creditors were not bound to examine the record books of the defendant corporation before trusting it, and such records are not notice to them. Wetherbee v. Baker, 35 N. J. Eq. 501.

Order denying a motion for a new trial is reversed, and a new trial granted.

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JAMES H. MAHLER and Another v. MERCHANTS NATIONAL BANK and Others.[1]

June 4, 1896.

Nos. 10,051—(109).

Appeal—Assignments of Error.

The trial court made eleven separate and distinct findings of fact in this case, and the motion for a new trial was made on four distinct grounds. *Held*, that neither an assignment of error that the findings of fact are not justified by the evidence, nor one that the court erred in denying the motion for a new trial, is sufficient to present for review any specific errors.

Usury.

Findings of fact considered, and *held*, that they sustain the conclusion of law by the trial court to the effect that a certain note was not usurious.

Appeal by plaintiffs from an order of the district court for Ramsey county, Kelly, J., denying a motion for a new trial. Affirmed.

Michael & Peebles, for appellants.

C. W. G. Withee and *Davis, Kellogg & Severance*, for respondent.

START, C. J. The plaintiffs brought this action against the defendants, the Merchants National Bank and A. K. Brockelsby, to recover the possession of a negotiable promissory note made by the plaintiffs, and two life insurance policies assigned by them to secure the payment of the note, on the ground that the note and assignment were usurious and void. The defendant bank, by its answer, alleged that it received the note and policies from the United States

[1] Reported in 67 N. W. 655.

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Bank of Hartford, Connecticut, for collection, and disclaimed any other interest in the property. Thereupon the United States Bank became a party to this action, by intervention, and alleged that it was the owner and entitled to the possession of the note and securities, and demanded that they be returned to it. The defendant Brockelsby disclaimed any ownership or right of possession to the property. The trial court made its findings of fact and conclusions of law to the effect that the intervenor, the United States Bank, was the owner and entitled to possession of the property, and ordered judgment accordingly. The plaintiffs appealed from an order denying their motion for a new trial.

Three assignments of error are made by appellants, viz.: (1) The findings of fact and conclusions of law of the trial court are not justified by the evidence, and are contrary to law; (2) the conclusions of law are not justified or supported by the findings of fact; (3) the trial court erred in denying plaintiffs' motion for a new trial. These assignments are insufficient to raise the question whether the findings of fact—all or any of them—are justified by the evidence. There are eleven separate and distinct findings of fact, and the motion for a new trial is made on four separate and distinct grounds. In such cases it has been repeatedly held by this court that an assignment that the findings of fact are not supported by the evidence, or that the court erred in denying the motion for a new trial, is too general to present any specific error for review. Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842; Smith v. Kipp, 49 Minn. 119, 51 N. W. 656; In re Granstrand, 49 Minn. 438, 52 N. W. 41; Moody v. Tschabold, 52 Minn. 51, 53 N. W. 1023.

The second assignment of error presents the question whether the findings of the trial court sustain its conclusions of law to the effect that the note in question is not usurious and void. This conclusion is sustained by the findings of fact.

The trial court found as a fact that the plaintiffs employed L. P. Van Norman, who was a broker, as their agent to procure a loan for them. Accordingly, they made the note in question, in the sum of $900, payable to the order of themselves, due in six months, and wrote their names, by indorsement in blank, on the back of the note, and delivered the same to Van Norman, with a blank assignment of the insurance policies in question, securing the payment of the note,

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with the intention that Van Norman should send the note to some person in the East, through or by whom the note would be sold or discounted. The plaintiffs agreed to pay Van Norman $61 for his services in securing the loan, which was deducted by him from the face amount of the note, with interest in advance at the rate of ten per cent. per annum, amounting to $45, and he gave the plaintiffs his personal check for the balance, $794. Van Norman, to raise the money paid the plaintiffs, drew his draft on the defendant Brockelsby, a broker in Hartford, Connecticut, for the sum of $841.–50, with note and policies attached, who, on receiving them, sold the note, with the security, to the intervenor, the United States Bank, for the full face of the note, less a discount at the rate of six per cent. per annum. The bank so purchased and paid for the note in good faith, without notice; and, out of the money so received, Brockelsby paid Van Norman's draft. By this transaction Brockelsby received from Van Norman $13.50 of the $61 retained by the latter for his services. The court also finds that at or about the maturity of the note the plaintiffs, through Van Norman, paid Brockelsby a further sum of $13.50, over and above interest in advance at ten per cent. per annum, for procuring a further extension of the time of payment of the note for six months.

There is no finding that Van Norman was also the agent of Brockelsby in the transaction, or that the employment of Van Norman to obtain the money for the plaintiffs was a mere make-shift to avoid the usury laws of the state. On the contrary, the trial court unqualifiedly found that the plaintiffs employed Van Norman in the transaction, and agreed to and did pay him for his service $61. This being so, no greater rate of interest was paid or contracted for than ten per cent. per annum. Therefore the note was not usurious. The original transaction being valid, the exaction of a bonus in excess of the legal rate by Brockelsby after the note became due did not make the note usurious.

Order affirmed.

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F. S. PINKUS v. MINNEAPOLIS LINEN MILLS and Others.[1]

June 4, 1896.

Nos. 10,108—(156).

Stockholder—Acquiescence in Corporate Act—Effect.

When an act done by the directors of a corporation is in fact unauthorized, but was done with the bona fide intention of benefiting the corporation, a shareholder, knowing thereof, who does not dissent within a reasonable time, will be presumed to have assented to the act, if his failure to dissent is unexplained.

Same—Unauthorized Exchange by Directors—Ratification—Equitable Estoppel.

The business of the defendant corporation was a failure, and was indefinitely discontinued to save further loss. It was in debt, but its plant was not salable for money at a fair valuation. Thereupon the directors, with the approval of all of the shareholders except the plaintiff, in good faith in the exercise of reasonable business prudence, exchanged a part of the plant for paid-up shares of the capital stock of another corporation, which was a going concern and authorized to engage in the business of manufacturing knit goods. The articles of incorporation of the defendant company did not authorize such exchange, but the plaintiff was fully advised of the transaction at the time, but not before it was completed, and he in no way dissented or objected to the exchange for more than two years. In the meantime the directors took no steps to rescind the sale, but sold the balance of the plant and paid the debts of the corporation. *Held*, that the plaintiff, as such shareholder, cannot maintain this action to recover from the directors and the corporation his proportionate share of the property so exchanged.

Appeal by plaintiff from an order of the district court for Hennepin county, Belden, J., denying a motion for a new trial. Affirmed.

Judson L. Wicks and *C. L. Lamb*, for appellant.

The transaction complained of was beyond the authorization of the charter, and illegal unless ratified by all the stockholders. Morawetz, Priv. Corp. § 415; Black v. Delaware & R. Canal Co., 24 N. J. Eq. 455. When a corporation has determined to go out of business, the directors must convert the assets into cash and distribute

[1] Reported in 67 N. W. 643.

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the cash among its members. Morawetz, Priv. Corp. § 415. They have no right to barter the assets for stock in other corporations. Id.; Frothingham v. Barney, 6 Hun, 366; McCurdy v. Myers, 44 Pa. St. 535; Taylor v. Earle, 8 Hun, 1.

Even if stock of fixed money value and convertible into cash may be exchanged, as said in Treadwell v. Salisbury Mnfg. Co., 7 Gray, 393, the court has not found the value of the stock or any facts constituting such exception. Byrne v. Schuyler E. M. Co., 65 Conn. 336, 31 Atl. 833. Plaintiff never consented to take stock in a hosiery company. Mason v. Pewabic Min. Co., 133 U. S. 50, 10 Sup. Ct. 224. Plaintiff has disavowed the wrongful act and seeks to recover the value of the property converted. See Frothingham v. Barney, supra; Byrne v. Schuyler E. M. Co., supra. Plaintiff may prosecute the action personally, since the corporation is in control of those who committed the unlawful act. Rothwell v. Robinson, 39 Minn. 1, 38 N. W. 772. He is not estopped. Califf v. Hillhouse, 3 Minn. 217 (311). See Village of Wayzata v. Great North. Ry. Co., 46 Minn. 505, 49 N. W. 205.

He has not lost his right by laches. Mere silence or failure to complain does not amount to acquiescence or ratification. Fitzgerald v. Fitzgerald & M. C. Co., 44 Neb. 463, 62 N. W. 899; Wald's Pollock, Cont. 546; Pence v. Langdon, 99 U. S. 578; Montgomery v. Pickering, 116 Mass. 227; Tarkington v. Purvis, 128 Ind. 182 25 N. E. 879; Moxon v. Payne, L. R. 8 Ch. App. 881; Foley v. Holtry, 41 Neb. 563, 59 N. W. 781; Tynan v. Warren, 53 N. J. Eq. 313, 31 Atl. 596.

Plaintiff is entitled to the appointment of a receiver. Frothingham v. Barney, supra.

Johnson, Leonard & McCune and *Edward C. Gale*, for respondent.

The act complained of was not unlawful, or ultra vires.

This is not the case of a going corporation attempting to dispose of all its property to another corporation, either in good faith or with some ulterior motive, as in Small v. Minneapolis E. M. Co., 45 Minn. 264, 47 N. W. 797; Byrne v. Schuyler E. M. Co., 65 Conn. 336, 31 Atl. 833.

Where the business of a corporation is a failure and the best interests of the stockholders require the sale of the assets of the com-

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pany so as to wind up the business, the majority of the stockholders have power to do so even against the protests of the minority. Morawetz, Priv. Corp. §§ 413–417; Beach, Priv. Corp. §§ 357–359; Cook, Stock & Stockh. § 667; Rothwell v. Robinson, 44 Minn. 538, 47 N. W. 255; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Hayden v. Official Hotel Directory Co., 42 Fed. 875; Lauman v. Lebanon R. Co., 30 Pa. St. 42; Sawyer v. Dubuque Printing Co., 77 Iowa, 242, 42 N. W. 300; Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911. Under the circumstances, the majority of the stockholders had power, as a step in closing out the business, to sell in good faith a portion of the corporate assets for shares of the capital stock of another manufacturing corporation, a going concern, whose authorized business was permitted to be done by the selling company under its articles of incorporation, the statutes of the state and the articles of incorporation of both corporations being silent on the subject. Beach, Priv. Corp. § 359; Hodges v. New England Screw Co., 1 R. I. 312; Treadwell v. Salisbury Mnfg. Co., 7 Gray, 393; Young v. Toledo & S. H. R. Co., 76 Mich. 485, 43 N. W. 632; Sawyer v. Dubuque Printing Co., supra; Buford v. Keokuk Packet Co., 69 Mo. 611; Howe v. Boston Carpet Co., 16 Gray, 493; Booth v. Robinson, 55 Md. 419; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; Easun v. Buckeye Brewing Co., 51 Fed. 156; Byrne v. Schuyler E. M. Co., supra.

Assuming the act complained of to have been ultra vires, plaintiff has not been injured in a legal sense, and cannot, therefore, recover any personal judgment against defendant directors; and, under the pleadings of this action, there could be no recovery for the benefit of defendant corporation. Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb. 374, 59 N. W. 838; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448; Davis v. Gemmell, 73 Md. 530, 21 Atl. 712; Howe v. Barney, 45 Fed. 668; Smith v. Hurd, 12 Metc. (Mass.) 371; Conway v. Halsey, 44 N. J. Law, 462; Davenport v. Dows, 18 Wall. 626; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; McMullen v. Ritchie, 64 Fed. 253; Beach, Priv. Corp. §§ 255, 256; Cook, Stock & Stockh. §§ 701, 737, 748; Pratt v. Bacon, 10 Pick. 123; Peabody v. Flint, 6 Allen, 52; Cunningham v. Pell, 5 Paige, 607; Allen v. Curtis, 26 Conn. 456; Smith v. Poor, 40 Me. 415; Craig v. Gregg, 83 Pa. St. 19; Evans v. Brandon, 53 Tex. 56; Carter v.

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Ford Plate Glass Co., 85 Ind. 180; Beach v. Cooper, 72 Cal. 99, 13 Pac. 161; Greaves v. Gouge, 69 N. Y. 154; Hirsch v. Jones, 56 Fed. 137; Oliphant v. Woodburn Coal Co., 63 Iowa, 332, 19 N. W. 212; Hodgson v. Duluth, H. & D. R. Co., 46 Minn. 454, 49 N. W. 197; Bjorngaard v. Goodhue Co. Bank, 49 Minn. 483, 52 N. W. 48; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56. Corporate officers are not liable for acts ultra vires which they have done or sanctioned, but in good faith without knowledge of their ultra vires character. Beach, Priv. Corp. § 252; Cook, Stock & Stockh. §§ 702, 703; Hodges v. New England Screw Co., supra; Spering's Appeal, 71 Pa. St. 11; Watts's Appeal, 78 Pa. St. 370; Williams v. McDonald, 37 N. J. Eq. 409; North Hudson B. & L. Assn. v. Childs, 82 Wis. 460, 52 N. W. 600; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924.

The directors of a corporation are its agents and occupy a fiduciary relation to it, and in relation to their possession or control of the corporate property they are treated as quasi trustees. Horn Silver Min. Co. v. Ryan, supra; Patterson v. Stewart, 41 Minn. 84, 42 N. W. 926; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Morawetz, Priv. Corp. § 516; Thompson v. Lambert, 44 Iowa, 239.

A principal may ratify the unauthorized or ultra vires acts of an agent by subsequent acquiescence; and mere silence for a sufficient length of time after knowledge of the unauthorized act done in his name will amount to such ratification. Stearns v. Johnson, 19 Minn. 470 (540); Story, Agency, §§ 255–8; Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. 568; Turner v. Kennedy, 57 Minn. 104, 58 N. W. 823; Cairnes v. Bleecker, 12 Johns. 300; Minnesota L. Oil Co. v. Montague, 65 Iowa, 67, 21 N. W. 184; Story, Agency, § 243. Dissenting stockholders must show themselves prompt and vigilant in the assertion of their rights as such stockholders. Morawetz, Priv. Corp. §§ 630–1; Cook, Stock & Stockh. § 732; Martin v. Pensacola & G. R. Co., 8 Fla. 370; Watts's Appeal, supra; In re Pinto Silver Min. Co., L. R. 8 Ch. Div. 273; Gregory v. Patchett, 33 Beav. 595; Hodges v. New England Screw Co., 3 R. I. 9.

Plaintiff is barred by his continuous failure to object. He is guilty of laches as synonymous with acquiescence or ratification by equitable estoppel. Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221; Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Dunphy v.

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Traveller Newspaper Assn., 146 Mass. 495, 16 N. E. 426; Chaudiere Gold Min. Co. v. Desbarats, L. R. 5 P. C. 277; Gernsheim v. Olcott, 7 N. Y. Supp. 872; Descombes v. Wood, 91 Mo. 196, 4 S. W. 82; In re Magdalena S. Nav. Co., 6 Jur. (N. S.) 975; Thompson v. Lambert, 44 Iowa, 239; Sheldon H. B. Co. v. Eickemeyer H. B. M. Co., 90 N. Y. 607; Ashhurst's Appeal, 60 Pa. St. 290; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Allen v. Wilson, 28 Fed. 677; Taylor v. South & N. Ala. R. Co., 4 Woods, 575, 13 Fed. 152; Squair v. Lookout Mountain Co., 42 Fed. 729; Kitchen v. St. Louis, K. C. & N. Ry. Co., 69 Mo. 224; Snow v. Boston B. B. Mnfg. Co., 158 Mass. 325, 33 N. E. 588; International & G. N. R. Co. v. Bremond, 53 Tex. 96; Graham v. Birkenhead Railway, 2 Macn. & G. 146; Cook, Stock & Stockh. §§ 728–732.

Plaintiff is not entitled to a receiver. Rothwell v. Robinson, 44 Minn. 538, 47 N. W. 255.

START, C. J. This is an appeal by the plaintiff from an order denying his motion for a new trial, and the only question for our consideration is whether the conclusion of law of the trial court, to the effect that the plaintiff is not entitled to any relief in the premises, is justified by its findings of fact.

The controlling facts found by the court may be summarized as follows: The defendant Minneapolis Linen Mills was organized as a corporation of this state on October 14, 1890, and its co-defendants are, and were at the time herein stated, the directors of the corporation, and managed its affairs. The corporation became the owner of a tract of land in the city of Minneapolis, with a brick building thereon, with machinery and appliances for the manufacturing of linen fabrics, which it used for that purpose. This plant constituted its principal property. The corporation commenced its business of manufacturing linen in the spring of 1891, and so continued to do until November 1, 1892, during which time its business was honestly and economically conducted, but it resulted in a loss of $30,000. The enterprise proved a failure, and on the day last named the directors indefinitely discontinued the business of the corporation to save further loss. If they had continued to prosecute its business, the result, in the end, would have been the loss of the en-

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tire capital. A sale of the plant at this time, for cash, at a fair valuation, was not practicable. It was costing $100 per month to take care of it, including taxes and insurance. The corporation had no money, and was owing $15,000. Thereupon, and on December 14, 1892, the directors authorized a sale to the Minneapolis Hosiery Company, a corporation of this state, organized to carry on the business of manufacturing hosiery and other knit goods, and to receive in pay therefor, in the name of the defendant Benton, in trust for the Minneapolis Linen Mills, paid-up shares of the capital stock of the hosiery company to the par value of $26,250. At this time the latter company was apparently prosperous, and the then probable value of this stock was at least the value of the property exchanged for it. This action of the directors was duly ratified at a meeting of the stockholders duly called for that purpose.

The plaintiff at this time owned stock in the linen mills of the par value of $2,500. He resided, during all the times herein stated, in the city of New York, and was not present at such stockholders' meeting; but, at or about the time the sale and transfer of the property of the linen mills was made to the hosiery company for the stock of the latter company, as hereinafter stated, he was informed and had knowledge of what proceedings were had at such meeting, and of the sale and exchange of the property for the stock. Yet he never made any objections to any of the defendants to such exchange, or to the taking of such stock, or signified his dissent in any manner thereto, until the time of the commencement of this action, over two years after such exchange had been consummated to his knowledge. He is the only stockholder who has objected to the exchange.

His failure to object sooner to the transaction is unexplained. The president and secretary of the linen mills, pursuant to such action of the directors and stockholders, conveyed one-half of its land, together with its building or factory thereon, and the property constituting its plant, except one-half of the land and such machinery as was special to the manufacturing of linen, to the hosiery company, and received in exchange the stock agreed on, which ever since has been, and now is, held by the defendant Benton, in trust for the linen mills. After such exchange, the directors of the defendant corporation proceeded with the work of winding up the affairs of the corporation, sold the balance of its machinery and other property, and paid all

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its debts, except some contingent liabilities, for the payment of which the corporation still has property. The directors were not authorized, by the articles of incorporation or by-laws of the linen mills, to exchange its property for the stock of another corporation; but the directors, in making such exchange, acted in good faith, in the exercise of reasonable business prudence, and in the honest belief that it was for the best interests, under all the circumstances, of the stockholders, to make the exchange. The affairs of the corporation have at all times been, and now are, fairly managed by the defendant directors, with a view to winding up the same, paying the debts of the corporation, and conserving the interests of its stockholders.

The plaintiff, on January 16, 1895, brought this action to recover his proportionate share of the value of the property so exchanged for the stock of the hosiery company, and for the appointment of a receiver for the corporation. Upon the facts found the trial court correctly directed judgment for the defendants.

It is by no means clear that the act of the directors, which was approved by all the stockholders except the plaintiff, was illegal. The corporation was not a going concern, but a failure. It was in debt, its plant was not salable at any fair valuation for money, it was necessary to wind up its affairs and pay its debts, and the directors did what, under all the circumstances, then seemed to them and a majority of the shareholders to be for the best interests of the corporation and its stockholders. 1 Beach, Priv. Corp. § 359; Treadwell v. Salisbury Mnfg. Co., 7 Gray, 393. But, conceding, without so deciding, that the act of which the plaintiff complains was illegal, and that, if he had acted promptly in the premises, he would have been entitled to the relief he now claims, we are of the opinion that the fact of his acquiescence, and failure to object promptly when fully advised of the action of the directors, if he intended to repudiate it, disentitles him to any relief equitable or otherwise. In view of the facts of this case, and his acquiescence in the action taken by the directors and all of the stockholders, except himself, for two years, and until after it was too late for the directors to rescind the sale made of a part of the plant for the stock of another corporation, and until after the sale of the balance of the plant for the payment of the debts, and winding up the affairs of the corpora-

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tion had been made, this action of the plaintiff is unsupported by any equity.

The equitable principles applicable to the facts of this case are too well settled to justify any extended discussion of them. Courts differ as to the precise designation of the ground upon which they deny relief to a dissenting stockholder, under the circumstances of this case. Some call it "ratification"; others, "laches"; and still others, an "equitable estoppel." If required to name the ground on which any relief to the plaintiff must be denied in this case, we should designate it a "ratification by equitable estoppel"; but the name is immaterial. Turner v. Kennedy, 57 Minn. 104, 58 N. W. 823. It is inequitable for a stockholder, knowing that an act done by the directors and a majority of the stockholders, in good faith, for the benefit of the corporation, is in fact unauthorized, to apparently acquiesce by his silence, but secretly reserve an option to repudiate the act in case of loss, or to enjoy its benefits if it proves profitable. Fairness requires, in such cases, that dissenting shareholders should act promptly, and make known their objections without unreasonable delay. If they fail to do so, their assent to the unauthorized act will be presumed, and they will be estopped from denying that they have assented to or ratified the act. 2 Cook, Stock, Stockh. & Corp. Law, §§ 730–732; 2 Morawetz, Priv. Corp. §§ 630, 631; 2 Beach, Priv. Corp. § 887.

It is true, as claimed by the plaintiff, that the trial court did not expressly find that the plaintiff ratified the act of the directors in question, or that he is equitably estopped from denying that he assented to it; but the court did find evidentiary facts from which the inference necessarily follows that the plaintiff ratified, or is equitably estopped from denying that he has assented to, the act. It is perfectly evident, from the facts found, that the plaintiff failed to object to the alleged unauthorized sale of the property of the corporation for two years after he learned the fact, because he was waiting to see whether the transaction would prove a profitable one for the corporation. If it had so resulted, it is safe to say that this action would never have been commenced. Had he promptly objected, on being advised of the sale, the directors might have rescinded it, and refrained from selling the balance of the plant; or, if it was impracticable to rescind the sale, converted the stock of the

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hosiery company into money while that company was a going concern. But the plaintiff kept silent when it was his duty to speak, if he intended to object to the sale; and, presumably in reliance upon his apparent acquiescence, material changes were made by the directors in the property, situation, and affairs of the corporation. The simple fact is that the plaintiff, after learning of the alleged unlawful sale, waited for two years, and speculated on the chances of the sale proving profitable to him, when he must have known that changes would probably be made in the affairs of the corporation, or rights waived by it, which would not have been made or waived if he had promptly objected to the sale. He is not entitled to any relief under such circumstances.

The plaintiff claims that, in any event, he is entitled to have the property and affairs of the corporation placed in the hands of a receiver. The fact that the court has found that the affairs of the corporation are being honestly and prudently managed, for the best interests of all parties, is a sufficient answer to the claim.

Order affirmed.

REUBEN F. LITTLE v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.[1]

June 8, 1896.

Nos. 9825—(39).

Injury to Land in Another State—Action—Venue.

An action will lié in this state to recover damages for injuries to land situate in another state.

Same.

Such an action is purely personal in its nature, the reparation being purely personal, and for damages.

Same—G. S. 1894, §§ 5182, 5183.

The statute of this state that actions for injuries to real estate must be brought in the county where the subject of the action is situated only applies to causes of action arising within the state.

[1] Reported in 67 N. W. 846.

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Action in the district court for Ramsey county. The complaint alleged that plaintiff was the owner of certain lands in Polk county, Wisconsin, adjacent to defendant's railway, and of certain personal property thereon, and that defendant, while running its train past said land, by its negligence set a fire which damaged the land and burned the personal property. Defendant answered on the merits, and also in the seventh paragraph of the answer alleged that the court had not jurisdiction because the legislature of Wisconsin, prior to the time at which the alleged damages arose, enacted that all actions for injury to real property should be tried within the county in which the subject of the action is situate. Plaintiff demurred to the seventh paragraph of the answer. It was stipulated that for the purpose of the demurrer the action should be treated as if it were solely for the recovery of injuries to real property in Wisconsin. From an order overruling the demurrer on the ground that the complaint did not state a cause of action, (Brill, J.), plaintiff appealed. Reversed.

Henry C. James, for appellant.

The court had jurisdiction of the subject-matter. Const. art. 1, § 8; art. 6, §§ 1, 5; Agin v. Heyward, 6 Minn. 53 (110); Southern Minn. R. Co. v. Stoddard, 6 Minn. 92 (150); Armendiaz v. Stillman, 54 Tex. 623; Genin v. Grier, 10 Ohio, 209; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182; Barney v. Burstenbinder, 7 Lans. 210. See 2 Smith, Lead. Cas. (9th Ed.) 916, 939, 970; Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411, per Marshall, C. J.

L. K. Luse and *Thomas Wilson*, for respondent.

The constitutional provision is to be read in the light of the common law rules in force when it was adopted. 3 Am. & Eng. Enc. Law, 680; St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 99 (132); Mead v. Walker, 17 Wis. 189; County Board of Dane v. Dunning, 20 Wis. 210; Whallon v. Bancroft, 4 Minn. 70 (109). Prior to the adoption of the state constitution an action for injury to land located in another state could not be maintained here. Watt's Admrs. v. Kinney, 23 Wend. 484; American U. Tel. Co. v. Middleton, 80 N. Y. 408; Cragin v. Lovell, 88 N. Y. 258; Dodge v. Colby, 108 N. Y. 445,

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15 N. E. 703; Allin v. Connecticut R. L. Co., 150 Mass. 560, 23 N. E. 581; Champion v. Doughty, 18 N. J. Law, 3; Deacon v. Shreve, 23 N. J. Law, 204; Bettys v. Milwaukee & St. P. Ry. Co., 37 Wis. 323; Mathie v. McIntosh, 40 Wis. 120; Brown v. Irwin, 47 Kan. 50, 27 Pac. 184; Thayer v. Brooks, 17 Ohio, 489; Bruins v. Bruins, 55 Wis. 548, 13 N. W. 542; Eachus v. Trustees Ill. & M. Canal, 17 Ill. 534; Cooley, Torts, 471; Du Breuil v. Pennsylvania Co., 130 Ind. 137, 29 N. E. 909.

MITCHELL, J. This action was brought to recover damages for injuries to real estate situated in Wisconsin, caused by the negligence of the defendant. The question presented is, can the courts of this state take cognizance of actions to recover damages to real estate lying without the state; in other words, is such an action local or transitory in its nature?

The history of the progress of the English common law respecting the locality of actions will aid in determining how this question ought to be decided on principle. Originally, all actions were local. This arose out of the constitution of the old jury, who were but witnesses to prove or disprove the allegations of the parties, and hence every case had to be tried by a jury of the vicinage, who were presumed to have personal knowledge of the parties as well as of the facts. But, as circumstances and conditions changed, the courts modified the rule in fact, although not in form. For that purpose they invented a fiction by which a party was permitted to allege, under a videlicet, that the place where the contract was made or the transaction occurred was in any county in England. The courts took upon themselves to determine when this fictitious averment should and when it should not be traversable. They would hold it not traversable for the purpose of defeating an action it was invented to sustain, but always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction. Those actions in which it was held not traversable came to be known as transitory, and those in which it was held traversable as local, actions. Actions for personal torts, wherever committed, and upon contracts (including those respecting lands), wherever executed, were deemed transitory, and might be brought wherever the defendant could be found.

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As respects actions for injuries to real property, we cannot discover that it was definitely settled in England to which class they belonged prior to the American Revolution. As late as 1774, in the leading case of Mostyn v. Fabrigas, 1 Cowp. 161, 2 Smith, Lead. Cas. (9th Ed.) 916, Lord Mansfield, who did more than any other jurist to brush away those mere technicalities which had so long obstructed the course of justice, referred to two cases in which he had held that actions would lie in England for injuries to real estate situated abroad. In that same case he said:[2] "Can it be doubted that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject, especially for injuries where the whole that is prayed is a reparation in damages or satisfaction to be made by process against the person or his effects within the jurisdiction of the court?" While all that is there said as to actions for injuries to real property is obiter, yet it clearly indicates the views of that great jurist on the subject. And we cannot discover that it was fully settled in England that actions for injuries to lands were local until the decision of Doulson v. Matthews, 4 Term R. 503, in 1792,—16 years after the declaration of American independence. The courts of England seem to have finally settled down upon the rule that an action is transitory where the transaction on which it is founded might have taken place anywhere; but is local when the transaction is necessarily local,—that is, could only have happened in a particular place. As an injury to land can only be committed where the land lies, it followed that, according to this test, actions for such injuries were held to be local. As the distinction between local and transitory venues was abolished by the judicature act of 1873,[3] we infer that actions for injuries to lands lying abroad may now be maintained in England.

It is somewhat surprising that the American courts have generally given more weight to the English decisions on the subject rendered after the Revolution than to those rendered before, and hence have almost universally held that actions for injuries to lands are local. In the leading case of Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411, which has done more than any other to mold

[2] At page 179, (Smith) page 936.

[3] See 36 & 37 Vict. c. 66, Rules of Procedure, 28.

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the law on the subject in this country, Chief Justice Marshall argued against the rule, showing that it was merely technical, founded on no sound principle, and often defeated justice; but concluded that it was so thoroughly established by authority that he was not at liberty to disregard it. But so unsatisfactory and unreasonable is the rule that since that time it has, in a number of states, been changed by statute, and in others the courts have frequently evaded it by metaphysical distinctions in order to prevent a miscarriage of justice. Chief Justice Marshall's own state of Virginia changed the rule by statute as early as 1819. Some courts have made a subtle distinction between faults of omission and of commission. Thus in Titus v. Inhabitants of Frankfort, 15 Me. 89, which was an action against a town for damages sustained by reason of defects in a highway, it was held that, while highways must be local, the neglect of the defendant to do its duty, being a mere nonfeasance, was transitory. It has also been held that where trespass upon land is followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass, and sues simply for the conversion of the property so carried away, the action would become transitory. American U. Tel. Co. v. Middleton, 80 N. Y. 408; Whidden v. Seelye, 40 Me. 247. Again, it has been sometimes held that an action for injuries to real estate is transitory where the gravamen of the action is negligence,—as for negligently setting fire to the plaintiff's premises. Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182; Barney v. Burstenbinder, 7 Lans. 210. In Ohio the rule has been repudiated, at least as to causes of action arising within the state, as being wholly unsuited to their condition, because under their judicial system it would result in many cases in a total denial of justice. Genin v. Grier, 10 Ohio, 209.

Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet has considered himself bound to adhere to it under the doctrine of stare decisis.

An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real. Every argument founded on practical considera-

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tions against entertaining jurisdiction of actions for injuries to lands lying in another state could be urged as to actions on contracts executed, or for personal torts committed, out of the state, at least where the subject-matter of the transaction is not within the state. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title of boundaries, etc., may be desirable, and often would be essential to the determination of the case, yet such considerations have never been held to render the actions local. Another serious objection to the rule is that under it a party may have a clear, legal right without a remedy where the wrongdoer cannot be found, and has no property within the state where the land is situated. As suggested by plaintiff's counsel, if the rule be adhered to, all that the one who commits an injury to land, whether negligently or willfully, has to do in order to escape liability, is to depart from the state where the tort was committed, and refrain from returning. In such case the owner of the land is absolutely remediless.

We recognize the respect due to judicial precedents, and the authority of the doctrine of stare decisis; but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations.

It is suggested that the statutes of this state, in conformity to the old rule, make actions for injuries to real property local. G. S. 1894, §§ 5182, 5183. This is true, and, strangely enough, in 1885 the legislature went so far as to provide that, if the county designated in the complaint is not the proper one, the court should have no jurisdiction of the action. But this statute has no application to causes of action arising out of the state. While it settles the rule and indicates the policy of this state as to actions for injuries to real property within the state, we do not think it ought to have any weight

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in determining what the rule should be as to causes of action arising out of the state, which can have no local venue here under the provisions of the statute. It does not appear whether the plaintiff lives in this state or in Wisconsin, but this is immaterial, for the place of his residence cannot affect the nature of the action. It is also true that in this particular case jurisdiction of the defendant could be obtained in Wisconsin, but this fact is likewise immaterial, and for the same reason.

Order reversed.

BUCK, J. I dissent. The doctrine laid down in the foregoing opinion is conceded to be against the great weight of judicial authority, and, according to my view, is unsound in principle, and contrary to a wise public policy. The plaintiff is a citizen of the state of Wisconsin, and the defendant a railroad corporation organized under the laws of that state with its line constructed therein and extending into this state. The action is brought in Minnesota to recover for damages done by the defendant to plaintiff's real estate situate in the state of Wisconsin. In my opinion, the action is one clearly local in its nature, and not transitory, and the courts of this state have no jurisdiction over the subject-matter.

In Cooley on Torts (page 471) it is said that:

"The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local. Therefore, while an action of trespass to the person or for the conversion of goods is transitory, action for flowing lands is local, because they can be flooded only where they are. For the most part, the actions which are local are those brought for the recovery of real estate, or for injuries thereto or to easements. [Here the injury alleged consisted in burning the grass, roots, vegetable mold, and other material forming part of the plaintiff's land.] * * * That actions for trespasses on lands in a foreign country cannot be sustained is the settled law in England and in this country."

I am not able to state whether it has been changed by statutory enactment, and the majority opinion merely infers that it has been so changed. Blackstone, whose Commentaries were written and delivered in the form of lectures before the students of Oxford University in 1758, says,[4] that: "All over the world actions transitory

[4] Volume 3, page 384.

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follow the person of the defendant, while territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England."

The case of Mostyn v. Fabrigas, 1 Cowp. 161, decided in 1774, is referred to as a leading case, yet the question here involved was not before the court in that case. There the plaintiff, Fabrigas, brought an action against Mostyn for assault and false imprisonment committed on the Island of Minorca, and it was held that the court had jurisdiction of the subject-matter. This was a transitory action, within the rules of all the courts. That a jurist as great as Lord Mansfield should inject into his opinion in that case a remark that was entirely without any relevancy to the question under consideration, adds but little force to its weight. And its force is still further lessened by the fact that ever since that decision the law of England has been settled by other eminent jurists as otherwise, and contrary to the majority opinion in this case. It seems to me misleading to call the case of Mostyn v. Fabrigas a leading one, and cite it as such upon an important legal question, when the point here involved was not there in issue. While the great weight of authority is manifestly against the doctrine laid down by the majority opinion, it may be well to refer to some of them more in detail.

In the case of Allin v. Connecticut R. L. Co., 150 Mass. 560, 23 N. E. 581, it was held that an action of tort for breaking and entering the plaintiff's close, situated in another state, could not be brought in the commonwealth of Massachusetts; and the court, in commenting upon the statute of that state which required actions for trespass quare clausum to be brought in the county where the land lies, said: "There seems to be no reason for holding that the statute renders an action for trespass to lands outside the state transitory which does not apply to an action for trespass to lands within the state." The statute has been in existence nearly 100 years, and we have not been referred to any authority or dictum to sustain the position of the plaintiff. On the contrary, the action of trespass quare clausum has always been treated as a local action. In the case of Niles v. Howe, 57 Vt. 388, it was held that trespass on the freehold would not

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lie in that state for a trespass committed on lands situated in the state of Massachusetts.

In Du Breuil v. Pennsylvania Co., 130 Ind. 137, 29 N. E. 909, the court say an action cannot be maintained in this state for an injury to land lying in another state, caused by a railway company having a line of railroad running through this and such other state. That court also applied the same doctrine to an action for injury to land caused by fire escaping from locomotives in the case of Indiana, B. & W. Ry. Co. v. Foster, 107 Ind. 430, 8 N. E. 264. In the first Indiana case above cited Chief Justice Elliott says: [5] "The case before us is one in which the land lies within the territory of another sovereignty, and there can be no doubt upon principle or authority that our courts have no jurisdiction." In Eachus v. Trustees, 17 Ill. 534, it was held that the courts of Illinois had no jurisdiction in an action to recover for injuries to land situate in Lake county, in the state of Indiana. In Bettys v. Milwaukee & St. P. Ry. Co., 37 Wis. 323, it was held that an action for injury to realty situated in Iowa could not be maintained in the courts of the state of Wisconsin. Chief Justice Ryan, delivering the opinion of the court, said that it was plainly a local action under all of the authorities, which could not be maintained in the state of Wisconsin; and he cited Co. Litt. 282a; Bac. Abr. "Action" A (p. 79); Comyn, Dig. "Action" N, 4, 5 (p. 251); Doulson v. Matthews, 4 Term R. 503.

In the state of New York the doctrine is well settled by numerous decisions of its highest court that suits cannot be there maintained for injuries to lands situated in other states. See American U. Tel. Co. v. Middleton, 80 N. Y. 408; Cragin v. Lovell, 88 N. Y. 258; Sentenis v. Ladew, 140 N. Y. 463, 35 N. E. 650; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703. In the last case Chief Justice Ruger, in delivering the opinion, says: [6]

"The doctrine that the courts of this state have no jurisdiction of actions for trespass upon lands situated in other states is too well settled to admit of discussion or dispute. * * * The claim urged by the plaintiff, that, if not permitted to maintain this action, he is without remedy for a most serious injury, is quite groundless, and affords no reason for the assumption of a jurisdiction by this court which it does not possess. The plaintiff would seem to have the same

[5] At page 138.

[6] At page 451.

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remedy for the trespasses alleged that all other parties have for similar injuries. His lands cannot be intruded upon without the presence in the state of the wrongdoer, and no reason is suggested why he could not seek his remedy against the actual wrongdoers in the courts having jurisdiction. His remedy is ample, and it is no excuse for assuming a jurisdiction which we do not have that the plaintiff desires a remedy against a particular person, rather than one against the real perpetrators of the injury, who were exposed to prosecution in the place where the wrong was committed."

This language would apply to the plaintiff in this case. The defendant is a resident of the state of Wisconsin, subject to its laws, and service of summons can there be readily and easily made upon it. The gravamen of the complaint is injury to the freehold, and the records of title to that freehold, whether in or out of the plaintiff, are accessible without trouble, and witnesses, doubtless, are obtainable without extra expense. The plaintiff is not without redress otherwise than in the courts of Minnesota. In fact it is not claimed that the courts of Wisconsin have no jurisdiction to try this action, and it is plain that they have such jurisdiction.

As a matter of policy, citizens of other states should not be permitted the use of our courts to redress wrongs and injuries to real property committed within their own territory. That is not what our courts were created or organized for. Nonresidents should not be invited to bring to our courts litigation arising over injuries to real property outside of our territorial limits. Certainly there is nothing in our constitution or laws which justifies them in imposing the burden of maintaining courts at our expense for their use and benefit. Protection of our own citizens is the primary object and duty of our own courts, and it is, to say the least, a very generous and liberal interpretation of the law which accords to suitors residing in other states the right to litigate in our courts questions of injury to real estate there situate, while the courts of those states reject the claim of our own citizens to litigate there injury to real estate situate here; notably the adjoining state of Wisconsin, which adjoins our state, and where the subject-matter of this litigation is situated. It is clearly against our interests that those living in the state of Wisconsin near the division line should be encouraged in this class of litigation because our laws may be more favorable as to the rules of evidence, or for any other cause, and thus necessitate

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taxation of our people that nonresidents may have a forum to litigate that which ought to be and is a local action in the state of Wisconsin. Our citizens have no such right in the courts of Wisconsin. Comity should be reciprocal, and this can be more properly obtained by legislative enactments of the respective states than by an interpretation in direct conflict with the almost universal judicial decisions elsewhere. But I should seriously doubt the wisdom of any such enactment. It might, perhaps, prevent the miscarriage of justice in some cases, but it would aid such miscarriage in many instances.

The defendant, like many other railroad corporations, extends its line from other states to this, and owns a vast amount of lands here. It may allege that citizens of our state are committing injuries to its real property here, and if such a person owns land in Wisconsin, or shall be found there, it could, under such a law, commence a suit in the courts of Wisconsin, and thus put our citizens to the trouble and expense of going to that state for trial of a case which in all fairness should be tried here. Railroad companies thus situated have great facilities for transporting their witnesses over their own lines without expense to themselves, while a poor man, charged, perhaps unjustly, with a trespass, must travel hundreds of miles into another state to meet his accusers, or suffer judgment by default. The majority opinion means defeat for the railroad company in this case, but it would mean victory for them hereafter if an alleged trespasser upon their lands in Minnesota is caught in Wisconsin and made to answer in its courts, if such a law should prevail there. Now citizens of Wisconsin will have an unjust advantage over citizens of Minnesota. Again, suppose the courts of California should adopt the doctrine of the majority opinion, and one of our citizens should visit that state for pleasure, health, or business, and is there sued by some one claiming that lands belonging to him situate here have been damaged by such citizen of Minnesota, would it not seem a miscarriage of justice that the trial in such case must take place thousands of miles away from the man's home, and from the situs of the property alleged to have been injured? The hardship of such a proceeding would seem to be intolerable, and I cannot give my assent to any such doctrine, whatever may be the rule as to the trial of actions upon voluntary contracts between parties; and I prefer that

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the rule should be that for injuries to real property the jurisdiction of our courts should only be co-extensive with its territorial sovereignty.

This doctrine, which is so strongly imbedded in the common law and judicial authorities of the country, is further adhered to by our own statute, which provides that actions for injuries to real property shall be brought in the county where the subject of the action is situated, and prohibits the court from having jurisdiction if brought in any other county. G. S. 1894, § 5183. Thus we have a legislative recognition of the doctrine that actions for injuries to real estate are local. If there is any implication arising from legislative enactments as to the jurisdiction of courts to try actions for injury to real estate elsewhere, it would be against the contention of the plaintiff. The statute makes no distinction between trespass to lands within and without the state. It does not make the action for trespass to lands outside the state transitory. There is no warrant in the language of the constitution or statute which justifies the majority opinion, and, if sound, it must rest upon some other foundation than is to be found in the letter of the law. It is a rule which is more favorable to the plaintiff than the defendant. The former can select his own forum; the latter is helpless. No change of venue can be granted, because none is authorized.

In criminal cases the doctrine of local venue applies. One of the specifications of complaint in the immortal Declaration of Independence against Great Britain was, "For transporting us beyond seas to be tried for pretended offenses." Our constitution (article 1, § 6) provides that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." No one pretends but that this is a sound and reasonable principle of law, and I have never known of its being assailed as tending to a miscarriage of justice. This constitutional guaranty applies to petty offenses wherever a small fine might be imposed, and yet where, perhaps, all the property which a man owns might be at stake, he can, if found in another state, perhaps thousands of miles away from home and witnesses and the location of the alleged injured property, be tried civilly in a foreign sovereignty. Why could

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he not also in a civil action be tried in China, Russia, England, Spain, Cuba, or Mexico, if found there, and there served with process, if the doctrine of the majority opinion is to prevail? In the case of Niles v. Howe, 57 Vt. 388, the court say: "It would hardly be claimed that our courts had jurisdiction over a crime committed in another state. And yet the same reasoning that supports the doctrine of local venue applies equally to crimes and real actions."

I think that the order should be affirmed.

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EMMA A. KURTZ and Another v. ST. PAUL & DULUTH RAILROAD COMPANY.[1]

June 8, 1896.

Nos. 9861—(124).

Appeal—Reversal of Judgment—Effect.

The effect of the decision of this court on a former appeal reversing the judgment of the trial court (61 Minn. 18), was not to grant a new trial, but to remand the cause, leaving the trial court at liberty to proceed in any way not inconsistent with the opinion of this court; and, upon the findings which remained undisturbed, the defendants were entitled to judgment.

Judgment Inter Alios—Evidence.

Rule applied that a judgment inter alios is not evidence against a third party of any of the facts upon which it was based.

Probate Court—Power to Correct Files and Records.

Over 23 years after the confirmation of a guardian sale, and after the execution of the guardian's deed, the probate court assumed to amend all the files and records, from the petition for license to sell to the guardian's deed, so as to exclude from the description a part of the land described in the petition for license, license to sell, report of sale, order of confirmation, and guardian's deed. *Held*, that the action of the probate court was without jurisdiction, and void.

New Trial—Laches.

Held, also, that the plaintiffs were guilty of such gross laches that it was error to grant them a new trial.

[1] Reported in 67 N. W. 808.

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Appeal by defendants St. Paul & Duluth Railroad Company and Northern Pacific Railroad Company from an order of the district court for St. Louis county, Morris, J., setting aside an order for judgment in favor of defendants and the judgment entered thereon and granting a motion for a new trial. Reversed.

C. W. Bunn and *Hadley & Armstrong*, for appellants.

J. W. Bull and *H. L. Lord*, for respondents Kurtz and Leidner.

Cash, Williams & Chester, for respondent West Duluth Land Co.

MITCHELL, J. This is the third time this case has been before this court. 48 Minn. 339, 51 N. W. 221; 61 Minn. 18, 63 N. W. 1. After the cause was remanded on the last appeal, and on August 20, 1895, the defendant railroad companies moved for judgment in their favor on the findings of fact, the mandate of this court, and on the files and records in the action. This motion was granted on September 14, but with a stay of proceedings for 20 days with leave to plaintiff to move for a new trial. On October 5, the stay having expired, judgment was entered in favor of the defendant railway companies that plaintiffs take nothing by their suit. In the meantime, however, and on June 27, 1895, upon the application of plaintiffs, and upon notice or citation to Hayes and his grantee, the West Duluth Land Company, the probate court of St. Louis county had made an order or decree purporting to amend nunc pro tunc all the records and files in the probate proceedings which culminated in the guardian's sale to Hayes in May, 1872 (referred to on the former appeals), so that the land in controversy (the right of way) should be in terms excluded therefrom, and that the description should be amended by adding the words "excepting and excluding therefrom (the 80 acres) one hundred feet each side of the center line of the Lake Superior Railroad Company's railroad track, as laid over and across said land." This amendment was made to apply to all the proceedings, from the petition for license to sell to the guardian's deed, inclusive. On October 12, 1895, on motion of plaintiffs, of which notice was given September 30, the court set aside the judgment in favor of plaintiffs in this action, and granted a new trial. From this order the defendant railroad companies appealed.

The grounds upon which plaintiffs moved to vacate the judgment, and for a new trial, are not very clearly stated, but they are sub-

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stantially two: First, that the legal effect of the decision of this court was to grant a new trial; and, second, newly-discovered evidence and accident and surprise.

1. Upon that appeal we held that the finding of fact that the land in controversy (the right of way) was not included in the guardian's sale to Hayes was unsupported by any competent evidence, and for that reason we set aside that finding, and reversed the judgment in plaintiffs' favor, because, with that finding gone, there was nothing to support the judgment. The other findings, which were not disturbed, entitled the defendant railway companies to judgment in their favor. We gave no directions as to how the court below should proceed, for the reason that we did not wish, under the circumstances, to cut off the plaintiffs or the defendant the Duluth Land Company from the chance of moving for a new trial if any sufficient cause for granting one existed. The district court was therefore left free to proceed in any manner it saw fit, not inconsistent with the opinion of this court. As the findings left undisturbed were sufficient upon which to base a judgment for the defendants, it was the duty of the court to enter judgment on defendants' motion. The order of this court reversing the judgment in plaintiffs' favor did not have the effect of granting a new trial. Jordan v. Humphrey, 32 Minn. 522, 21 N. W. 713; National Inv. Co. v. National Sav., Loan & Bldg. Assn., 51 Minn. 198, 53 N. W. 546; Backus v. Burke, 52 Minn. 109, 53 N. W. 1013; Babcock v. Murray, 61 Minn. 408, 63 N. W. 1076.

2. The remaining question is whether plaintiffs showed any sufficient cause for a new trial.

The only surprise which plaintiffs even suggest is at the decision of this court on the former appeal. We can hardly be expected to hold that that is any ground for a new trial. The only "newly-discovered" evidence is the judgment in this action against Hayes and his grantee, the West Duluth Land Company, from which they have not appealed, and the "amended" probate proceedings which plaintiffs allege that they desire to introduce on another trial against the defendant railway companies, as evidence to prove that the "right of way" was not included in the guardian's sale to Hayes. It would be more appropriate to call this "newly-created" evidence, and the claim of plaintiffs is that, because it did not exist at the time of the last trial, they could not introduce it, and therefore they

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are entitled to a new trial, in which they can introduce it. The mere statement of the facts is sufficient, without argument, to show that the judgment in favor of plaintiffs against Hayes and the West Duluth Land Company would not be admissible in evidence against the defendant railway companies for any such purpose as that proposed.

The so-called "amendments" by the probate court of the guardian sale proceedings are an absolute nullity, the probate court having no jurisdiction to make them. State v. Probate Court of Ramsey Co., 19 Minn. 85 (117); State v. Probate Court of Sibley Co., 33 Minn. 94, 22 N. W. 10. Conceding to that court the same power possessed by other courts of record to correct mere clerical mistakes in its records, the pretense that this was such a case is the merest sham. If probate records can be tampered with in this manner after the lapse of nearly a quarter of a century, no title would be secure; for, on an average, every title passes through that court once in every generation.

But, even conceding the power of the probate court to do what it did, the plaintiffs were barred by gross laches from any right to a new trial. The defendant St. Paul & Duluth Railway Company, or rather its predecessor, obtained a guardian's deed (but which proved to be void) for this right of way, and went into possession in 1871, and has ever since remained in the actual, exclusive, and adverse possession of it. The guardian's deed to Hayes was executed in 1872, and was placed on record. The youngest of the Leidner heirs came of age in July, 1880. This action was not commenced until 1890, 10 years after the youngest heir came of age, and over 19 years after the St. Paul & Duluth Railroad Company went into possession. Plaintiffs were advised in 1891, by the decision of the district court, and in February, 1892, by the decision of this court, that the Hayes deed conveyed this right of way. If the probate records were capable of being amended, it was the duty, as well as within the power, of the plaintiffs to cause it to be done. But, without doing so, they chose to enter upon a second trial in 1894, relying upon their right to impeach the probate records collaterally. They were advised by this court on May 6, 1895, that this could not be done, and yet they made no move to have the probate records amended for nearly two months; and it was not until over three months

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later, and not until September 30, that they moved for a new trial. Not a particle of excuse was offered for all this delay.

Under all the circumstances, and in view of the entire history of this litigation, we think that, under any view of the law, it was error to set aside the judgment, and to grant a new trial.

Order reversed, and judgment in favor of defendants reinstated.

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MARY D. BEAN v. GEORGE S. HERON.[1]

June 8, 1896.

Nos. 9873—(125).

Judgment on Mortgage Debt—Supplemental Proceedings—Receiver.

Where a judgment creditor's demand is secured by mortgage, a receiver of the judgment debtor's property may be appointed in supplementary proceedings, although the creditor has not exhausted his mortgage security.

Appointment of Receiver—Discretion.

Whether a receiver should be appointed is a matter resting in the sound judicial discretion of the court.

Same—Adequacy of Security.

It would be oppressive, and an abuse of discretion, to appoint one where it appeared that the mortgage security was ample to pay the creditor in full.

Same—Appointment Sustained.

Held that, under the facts of this case, there was no abuse of discretion in appointing a receiver.

Appeal by defendant from an order of the district court for Ramsey county, Egan, J., appointing a receiver. Affirmed.

J. M. Hawthorne, for appellant.

A receiver will not be appointed where a creditor has a complete, prompt, and efficient remedy at law. Where there is a default on a mortgage, but it is clear that a foreclosure and sale will realize

[1] Reported in 67 N. W. 805.

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enough to pay the debt, a creditor will be left to his proceedings at law without the intervention of a receiver. 20 Am. & Eng. Enc. Law, 275, 277, 500; High, Rec. §§ 310, 403; Rice v. St. Paul & Pac. R. Co., 24 Minn. 464; Thayer v. Swift, Harr. (Mich.) 430; 1 Jones, Mortg. § 162; 6 Am. & Eng. Enc. Law, 675; Haas v. Chicago Bldg. Soc., 89 Ill. 498. When it appears on supplemental proceedings, that the judgment debtor has property liable to execution sufficient to satisfy the judgment, the court has no authority to appoint a receiver. Second Ward Bank v. Upmann, 12 Wis. 499; High, Rec. § 403; Parker v. Moore, 3 Edw. Ch. 234; Starr v. Rathbone, 1 Barb. 70.

Stringer & Seymour, for respondent.

The holder of a note secured by mortgage may recover judgment on the note and use the remedies which the law gives for its collection. 2 Jones, Mortg. c. 27; Id. § 1217; Pingrey, Mortg. § 1563; Tucker v. McDonald, 105 Mass. 423; Taylor v. Cheever, 6 Gray, 146; Palmer v. Foote, 7 Paige, 437; Newbold v. Newbold, 1 Del. Ch. 310; Story, Eq. Jur. § 547; Gates v. Young, 30 Hun, 477, 17 N. Y. Weekly Dig. 551. The appointment of a receiver was appropriate to reach real estate which could be the subject of an action by him. Flint v. Webb, 25 Minn. 263; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402; Beach, Rec. § 628; Tomlinson & W. Mnfg. Co. v. Shatto, 34 Fed. 380. Such proceedings take the place of a creditor's bill and are in the nature of an equitable execution. Riddle & Bullard. Supp. Proc. 14–23; Tomlinson & W. Mnfg. Co. v. Shatto, supra.

MITCHELL, J. This action was commenced and prosecuted to final judgment upon a note which was secured by a mortgage on real estate which has not been foreclosed. Execution was issued to the sheriff of the county where the defendant resided, and duly returned wholly unsatisfied. The defendant was then brought up on supplementary proceedings and examined concerning his property, and upon the close of such examination the judge made an order appointing a receiver of the defendant's property not exempt from execution, and restraining any transfer or other disposition thereof until the further order of the court. From this order defendant appealed.

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The principal point urged is that, where the judgment creditor's claim is secured by mortgage, it is error in any case to appoint a receiver, in supplementary proceedings, of the judgment debtor's property, until the creditor has exhausted his collateral security. Supplementary proceedings are a substitute for, and perform the office of, a creditor's bill, with a somewhat enlarged scope and purpose. Flint v. Webb, 25 Minn. 263; Towne v. Campbell, 35 Minn. 231, 28 N. W. 254. The statute provides that, in such proceedings, the judge may, in accordance with and subject to the rules of courts of equity, appoint a receiver of the property of the judgment debtor. G. S. 1894, § 5492. One of the rules of courts of equity was that their jurisdiction attached only when the creditor's legal remedies had been exhausted and proved inadequate. Hence it was usually necessary for the creditor to allege in his bill that he had obtained judgment and issued execution, and that there had been a return thereto of "Nulla bona." The argument of defendant's counsel is that, on the same principle, a creditor cannot have a receiver appointed in supplementary proceedings until he has exhausted the mortgage security which he holds for the payment of the debt. We do not so understand the authorities. The remedies on the note or other obligation and on the collateral mortgage are concurrent. The creditor may resort to either or both, but he shall not take double satisfaction of the debt. Unless prohibited by statute, a mortgagee may resort to all the remedies for the collection of his debt which the law affords, precisely as if he held no mortgage. It seems to have been well settled in the equity practice that a creditor might maintain a bill to reach and apply in the payment of his debt property of the debtor which could not be reached by execution, although the debt was secured by mortgage. This remedy being in the nature of an equitable execution, the view of the courts seems to be that there is no reason why it may not be pursued, just as the mortgagee might, by legal execution, levy on any property other than the mortgaged estate without first exhausting the latter. Jones, Mortg. § 1217; Pingrey, Mortg. § 1563; Tucker v. McDonald, 105 Mass. 423.

It does not follow that the mortgagee creditor is entitled in every case, as a matter of right, to have a receiver appointed. That is a matter resting in the sound discretion of the court. Flint v. Webb, supra. Equitable principles, which are always very flexible, should

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be taken into account in determining whether a receiver should be appointed. A receivership, the costs of which have to be paid, if any property is reached, out of the debtor's estate, is a very drastic remedy, and is subject to great abuses. At the present day it unfortunately is often more beneficial to the receiver and his attorneys than to the creditor. It should therefore be resorted to with great caution, and sparingly. Where it clearly appears that a creditor holds mortgage security ample to satisfy his whole debt, his application for a receiver of his debtor's other property ought, ordinarily, to be denied. In such a case it would be an abuse of judicial discretion to appoint one, unless, possibly, there were some exceptional circumstances.

In the present case we are unable to say that the court abused its discretion. The principal of the debt had been due over 8 months, and the interest was overdue and unpaid for about 15 months. The defendant was largely indebted, and either unable or unwilling to pay his debts in the ordinary course of business as they matured. Plaintiff's claim amounted to nearly $3,800. At the time this debt was contracted, defendant owned quite a large amount of property in St. Paul, which, in September, 1892,—after the debt was contracted,—he estimated worth about $125,000, and stated that it was incumbered to the extent of $15,000 or $20,000, and that he owed an additional $15,000 of unsecured indebtedness. All of this property, except an "equity" that does not appear to be of any substantial value, he had conveyed away or disposed of,—mostly to personal friends,—under circumstances strongly tending to show that it was done for the purpose of putting the property beyond the reach of creditors. Hence, when plaintiff obtained her judgment and issued execution, there was nothing in sight, except the mortgage security, out of which any part of the debt could be realized. The mortgaged premises are unimproved and unproductive. The only evidence as to their value is the affidavit of the defendant himself that he considers them reasonably worth $4,000, and the affidavits of two real estate dealers, one of whom says that he considers them worth $4,000, and the other that he considers them worth $4,000 to $4,500. It is noticeable, however, that none of them say what they think the premises would sell for. The fact that this security is of doubtful adequacy to satisfy plaintiff's claim is indicated,

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better than by anything else, by the attitude of the parties themselves; the plaintiff being evidently unwilling to take the property for her claim, and the defendant, on the other hand, being apparently desirous of compelling her to do so.

If, on foreclosure sales, real estate was sold to third parties for cash, it would be an easy and short matter to ascertain what the property would bring, and what the deficiency would be. But it is a matter of common knowledge that such sales are a mere form; that the property is generally bid in by the mortgagee, who has to wait for a year before he gets either money or property. By that time plaintiff's claim would amount to nearly $4,300, even if she should foreclose immediately. It is also a matter of common knowledge that the value of unimproved real estate—that is, what it will bring—is to a considerable extent a matter of opinion; also, that the amount which mortgagees will bid it in for often depends very much upon their chance of ever getting any more on their debt. If they think there is no such chance, they will usually bid up, in order to be sure, in case of a redemption, of realizing all that there is in the property. On the other hand, if they are assured that they can collect the deficiency from their debtor, they will bid in the property only for what they feel reasonably sure they can realize out of it.

Now, if plaintiff is compelled to first exhaust her mortgage before having a receiver appointed, the act of the defendant in putting all his other property out of his hands has placed her in just this position: If she should bid in the property for less than it proved to be worth at the end of a year, and it should be redeemed, the loss would fall on her, unless she was able to collect the deficiency out of the defendant. On the other hand, if she should bid it in for the full amount of her debt, say $4,000, and the property should prove to be worth less at the end of the year, the loss would still fall on her. In short, if, as the evidence tends to show, defendant has disposed of his other property for the purpose of placing it or its proceeds beyond the reach of his creditors, this wrongful conduct on his part has placed plaintiff, if she is compelled to first exhaust her security, where she has to take all the risks of loss, while defendant retains all the chances of gain. This, to our minds, is the strongest reason why we think it would be inequitable to deny the plaintiff the aid of

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a receiver in supplemental proceedings until she first forecloses her mortgage. Upon the whole case, we do not think the court abused its discretion in appointing a receiver.

Order affirmed.

CANTY, J. I cannot concur in the foregoing opinion. There is, in my opinion, a sufficient showing that the security is adequate; so that it is an abuse of discretion to appoint a receiver.

WILLIAM BLOMQUIST v. GREAT NORTHERN RAILWAY COMPANY.[1]

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June 8, 1896.

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Nos. 9945—(150).

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Fellow Servant—Hazards of Railroad Business—Sectionman—G. S. 1894, § 2701.

Plaintiff, with others, was employed as a sectionman in repairing defendant's main track, by taking up rails, putting in new ties, and then replacing the rails. The work had to be done with great and extraordinary haste, in order to avoid danger to trains that were, or might be, approaching. While engaged in performing this work with this degree of haste, and while he and another sectionman were carrying a heavy iron rail, plaintiff was injured by his fellow servant's negligently releasing his hold on the rail and letting it fall. *Held*, that plaintiff's employment involved an element of hazard or danger which contributed to the injury, and which was peculiar to the "railroad business," and that, therefore, G. S. 1894, § 2701, making railway companies liable to their servants for the negligence of their fellow servants, applied.

Appeal by plaintiff from an order of the district court for Hennepin county, Smith, J., sustaining a demurrer to the complaint. Reversed.

O. Mossness and *A. A. Anderson*, for appellant.

W. E. Dodge and B. D. Townsend, for respondent.

[1] Reported in 67 N. W. 804.

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MITCHELL, J. This action was brought to recover damages for personal injuries suffered by the plaintiff, while in the employment of the defendant, through the alleged negligence of a fellow servant. The question presented by the demurrer to the complaint was whether the facts alleged brought the case within the operation of Laws 1887, c. 13 (G. S. 1894, § 2701), making railway companies liable to their servants for damages caused by the negligence of a fellow servant.

The allegations of the complaint were that plaintiff was employed by the defendant as one of a crew of section hands, who were engaged in repairing defendant's track; that while he with the rest of the crew were engaged in the performance of their duties, it became necessary for them to take up from the main track a heavy iron rail, in order to remove the old ties and replace them with new ones, and for that purpose it became necessary to lift and carry the rail, in taking it from the track and afterwards replacing it, and in so doing it was necessary to use great and extraordinary haste, so as to accomplish the work of replacing the rail before the approach of a coming train; that while the rail was being thus moved and carried by the plaintiff and another section man, who were ordered by the section foreman to make haste, so that the track might be put in order so as to avert danger to a then approaching train, plaintiff's fellow servant, who was engaged with him in carrying the rail, negligently and suddenly released his hold of the rail, and dropped the same, by reason whereof plaintiff suffered the injuries complained of.

The language of the act is broad enough to include any injury sustained by any railroad employé, in any capacity, through the negligence of any other employé of the railroad in the same or any other capacity. In order to sustain the law, we have, by judicial construction, limited its operation to those employés of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called "railroad dangers." But, as the general language of the act has been thus limited for the sole purpose of sustaining its validity, we think it ought not to be limited further than is necessary for that purpose. We have held that the test is not whether the conditions are in some respects parallel to those to be found in some other kinds of business, or whether the appliances are, in some respects, similar to those used in some other

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kinds of business, but that if there is any substantial element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies. Nichols v. Chicago, M. & St. P. Ry. Co., 60 Minn. 319, 62 N. W. 386; Leier v. Minnesota Belt Line Ry. Co., 63 Minn. 203, 65 N. W. 269.

"Border cases" will occasionally arise where it will be difficult to determine whether they fall within the statute or not, and this may be one of them. But we think that under the allegations of the complaint it can be fairly said that plaintiff's employment involved an element of hazard or condition of danger peculiar to the railroad business, and intimately connected with and growing out of the operation of the road, to wit, that he was engaged in repairing the track upon which trains were operated, and that, in view of that fact, the work had to be done with great and unusual haste, in order to avoid danger to trains that were or might be approaching. We therefore think that the complaint stated a cause of action, and that the demurrer ought to have been overruled.

Defendant's counsel have not favored us with any brief, and for that reason the order appealed from might have been reversed under the rules; but, under the circumstances, we think that plaintiff is entitled to the benefit of a decision on the merits.

Order reversed.

GEORGE W. EWING v. JOHN CLARK and Wife.[1]

June 8, 1896.

Nos. 9984—(120).

Trust Deed—Undue Influence.

Held, that the evidence justified, if not required, a finding that a conveyance from a son to his father, in trust for the benefit of the grantor and his heirs, was improvident, unconscionable, and secured by undue influence, and for that reason ought to be set aside.

[1] Reported in 67 N. W. 669.

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Same—Termination of Trust—Rights of Cestui.

Held, also, that although the deed was executed over thirty-two years ago, yet the parties having, about two years thereafter, terminated the trust, and the grantee and trustee having done what it was his duty to do, and what equity would have compelled him to do, viz. reconveyed the property to the grantor, the cestui que trust under the deed has no equity which entitles him to have the trust upheld and enforced.

Action for partition in the district court for Ramsey county.

It was admitted that defendant, John Clark, was the owner of an undivided fourteen-fifteenths interest in the land. Plaintiff claimed title to an undivided one-fifteenth interest as sole heir and legal representative of George W. Ewing, Jr., under the deed of trust referred to in the opinion, which conveyed, with other property, the one-fifteenth interest in controversy and which was executed December 31, 1863, by his father, George W. Ewing, Jr., to George W. Ewing, Sr., the father of the grantor,

"for the uses and purposes following, to-wit: First. The said George W. Ewing, trustee as aforesaid, shall sell and convey all or such part or parts of the real estate hereby conveyed to him as he shall deem most advantageous for the interest of the trust hereby created, and the proceeds thereof to reinvest for the same purpose for which this trust is created or to expend the same in improving such of the property hereby conveyed as the said trustee shall deem most advisable and for the purpose of creating an income therefrom. Second. That of the income and proceeds arising under this trust a reasonable sum such as the trustee shall deem sufficient shall be expended in the maintenance of the said George W. Ewing, Junior, and the remainder, if any, after paying taxes, insurance and necessary expenses, shall be expended for the benefit of the trust when and at such times as the trustee shall deem best. Third. Should the said trustee die before his ward, that Jesse Halliday, of San Francisco, Cal., or upon his refusal to act such person as the court of common pleas of Allen County, Indiana, shall appoint, shall take up and continue this trust. Fourth. That upon the death of the said George W. Ewing, Junior, the property hereby placed in trust shall descend to the legal representatives of the said George W. Ewing, Junior, provided, however, that William G. Ewing, Junior, the adopted son of said William G. Ewing, deceased, shall under no circumstances whatever inherit or be entitled to any part or parcel thereof."

March 1, 1866, George W. Ewing, Sr., the trustee, executed a deed whereby he reconveyed to George W. Ewing, Jr., all the unsold property, including the undivided one-fifteenth interest in controversy, for the purpose of terminating the trust. Defendant John Clark

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claimed to be vested with the title of George W. Ewing, Jr., by mesne conveyances executed after the deed of reconveyance.

The court, Egan, J., found in favor of defendants, and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

John B. & E. P. Sanborn, for appellant.

Upon the execution of the trust deed, a future vested estate in the heirs of George W. Ewing, Jr., was created, in the one-fifteenth of the lots in controversy. G. S. 1858, c. 31, §§ 9, 10, 11, 12, 13; Ewing v. Warner, 47 Minn. 446, 50 N. W. 603; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065; Ewing v. Jones, 130 Ind. 247, 29 N. E. 1057. The trust expressed by this deed was authorized by the statute. G. S. 1858, c. 32, § 11, subd. 5. The whole estate in the land vested in the trustee, subject only to the execution of the trust, and the heirs of George W. Ewing, Jr., had the absolute right to the execution of the trust at all times after the deed was made, and George W. Ewing, Jr., had no right or interest in the land which he could enforce, because it was entirely discretionary with the trustee what sum he should expend for his maintenance. G. S. 1858, c. 32, § 16; Ewing v. Shannahan, supra; Ewing v. Warner, supra; Jones v. Chandler, 40 Ind. 588; 1 Perry, Trusts, § 315; Locke v. Barber, 62 Ind. 585; North v. Philbrook, 34 Me. 532; Neilson v. Lagow, 12 How. 98; Cleveland v. Hallett, 6 Cush. 403. The words "legal representatives" in the trust deed mean heirs. Ewing v. Warner, supra; Ewing v. Shannahan, supra; Ewing v. Jones, supra; Farnam v. Farnam, 53 Conn. 261, 2 Atl. 325, and 5 Atl. 682; Dunrow v. Walker, 2 Dallas, 205; Jennings v. Gallimore, 3 Vesey, Jr. 146.

This estate, thus vested in plaintiff, could not be divested by the deed made by the trustee. G. S. 1858, c. 32, § 21. The future estate in the heir, who was then in being, could not be destroyed, either by a revocation of the grantor in the trust deed or by a violation of the trust by the trustee or by both. Ewing v. Warner, supra; Ewing v. Jones, supra; Ewing v. Shannahan, supra; 1 Perry, Trusts (4th Ed.) § 104; Haynes v. Kershow, 1 Sandf. Ch. 258, 262-269; Wright v. Miller, 4 Seld. 9, 22, 27; Petre v. Espinasse, 2 M. & K. 496; Bill v. Cureton, 2 M. & K. 503; Ellison v. Ellison, 6 Ves. 656; Kekewich v. Manning, 1 De Gex, M. & G. 176; Sewall v.

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Roberts, 115 Mass. 262; Keys v. Carleton, 141 Mass. 45, 6 N. E. 524; Isham v. Delaware, L. & W. R. Co., 11 N. J. Eq. 227; Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899; Wright v. Moody, 116 Ind. 175, 18 N. E. 608. See Russell v. Russell, 36 N. Y. 581–586, and cases there cited; 2 Perry, Trusts, § 769. No power of revocation was contained in the trust deed, and its author could not revoke it. It was a complete executed trust, and, being perfect and complete, it must be enforced, whether it was a voluntary trust or made upon a valuable consideration. Ewing v. Jones, supra; Gaylord v. City of Lafayette, supra; Wright v. Moody, supra; Waterman v. Morgan, 114 Ind. 237, 16 N. E. 590; Ewing v. Shannahan, supra; Leeper v. Taylor, 111 Mo. 312, 19 S. W. 955; Lane v. Ewing, 31 Mo. 75; Pomeroy, Eq. Jur. (2d Ed.) §§ 966, 997.

The parol evidence offered by the defendants, to show that at the time this deed was made it was a part of the agreement between the parties that the trust was temporary simply and that the deed was revocable at the pleasure of the grantor, was incompetent because it contradicts the express terms of the deed itself, adds additional terms and destroys the writing. Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536; The Reeside, 2 Sumner, 567, Fed. Cas. No. 11,657; 1 Greenleaf, Ev. § 275; White v. National Bank, 102 U. S. 658; Metcalf v. Williams, 104 U. S. 93; Martin v. Cole, 104 U. S. 30. Even if declarations had been made at the time of the execution of the deed, and in the presence of William A. Ewing, his testimony as to the same would not have been admissible. Dodge v. Kiene, 28 Neb. 216, 44 N. W. 191; Nichols v. Crandall, 77 Mich. 401, 43 N. W. 875; American Surety Co. v. Thurber, 121 N. Y. 655, 23 N. E. 1129; Pittmann v. Burr, 79 Mich. 539, 44 N. W. 951. See Miller v. Butterfield, 79 Cal. 62, 21 Pac. 543; Bryan v. Idaho Quartz Min. Co., 73 Cal. 249, 14 Pac. 859; McCormick H. M. Co. v. Wilson, 39 Minn. 467, 40 N. W. 571; Wallace v. Berdell, 97 N. Y. 13. The declarations of a grantor made after he has parted with the title are not admissible to defeat the deed or to affect the title or rights fixed by the deed or acquired by others under it. See Burt v. McKinstry, 4 Minn. 146 (204); Zimmerman v. Lamb, 7 Minn. 336 (421); Howland v. Fuller, 8 Minn. 30 (50); Derby v. Gallup, 5 Minn. 85 (119); Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Smith v. McElyea, 68 Tex. 70, 3 S. W. 260–261.

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Fraud, oppression, mistake and undue influence cannot be inferred from an absence in the trust deed of a power of revocation. Barber v. Thompson, 49 Vt. 213; G. S. 1858, c. 34, § 36.

Stevens, O'Brien, Cole & Albrecht, for respondents.

If the instrument on its face be construed as plaintiff claims, a court of equity would set it aside for fraud and mistake in its execution, and the parties themselves having revoked it by the instrument of March 1, 1866, the court will sustain their action, even though no power of revocation was stated in the instrument. Evidence tending to show fraud is admissible in cases where fraud is the issue, although it may vary, add to or contradict the terms of the written contract. 1 Whart. Ev. § 931; 1 Greenleaf, Ev. § 284; 1 Story, Eq. § 200; Chitty, Cont. 119; Gatling v. Newell, 9 Ind. 572. Equity will often relieve against improvident and mistaken contracts upon the ground of constructive fraud, where no fraud in the active or opprobrious sense can be charged. Pomeroy, Eq. Jur. §§ 953–955; Kerr, Fr. & M. 45, 150; Story, Eq. Jur, §§ 307, 308, 309. The relation of parent and child has always been regarded as one of confidence. Story, Eq. Jur. § 309. See, also, Id. 307, 308; Kerr, Fr. & M. 179, 180. See Pomeroy, Eq. Jur. §§ 927, 928, 948, 962. Parol evidence is admissible. Kerr, Fr. & M. 386, 387; Pomeroy, Eq. Jur. §§ 858 et seq., 962; Wright v. Vanderplank, 8 De Gex, M. & G. 133–146; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Dent v. Bennett, 4 Mylne & Cr. 269; 1 Story, Eq. Jur. 307, 308; Rockafellow v. Newcomb, 57 Ill. 186; Wright v. Vanderplank, supra; Baker v. Bradley, 7 De Gex, M. & G. 597; Bergen v. Udall, 31 Barb. 9; Taylor v. Taylor, 8 How. 183; 2 Pomeroy, Eq. Jur. § 961; Hylton v. Hylton, 2 Ves. Sr. 547; Hatch v. Hatch, 9 Ves. 292, and note; Fish v. Miller, Hoff. Ch. 267; 2 Pomeroy, Eq. Jur. § 962; Gibson v. Jeyes, 6 Ves. 266; Hoghton v. Hoghton, 15 Beav. 278–299; Archer v. Hudson, 7 Beav. 551; Kerr, Fr. & M. 178, 179; Williams v. Powell, 1 Ired. Eq. 460; Chambers v. Crabbe, 34 Beav. 457; Jarvin v. Williams, 44 Mo. 465; Todd v. Grove, 33 Md. 188; Berdoe v. Dawson, 34 Beav. 603; Hugenin v. Basely, 2 Lead. Cas. Eq. (556), and notes; 2 Pomeroy, Eq. Jur. §§ 961, 962; Pierse v. Waring, 1 P. Wms. 121, note; 1 Story, Eq. Jur. § 317; 2 Pomeroy, Eq. Jur. § 961; Cooke v. Lamotte, 15 Beav. 234.

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The absence of a power to revoke a voluntary settlement of trust is viewed by courts of equity as a circumstance of suspicion, and very slight evidence of mistake, misapprehension or misunderstanding on the part of the settlor will be laid hold of to set aside the deed. 1 Perry, Trusts, § 104; Everett v. Everett, 10 L. R. Eq. 404; Huguenin v. Baseley, 2 Lead. Cas. Eq. 1250; Aylsworth v. Whitcomb, 12 R. I. 298; Garnsey v. Munday, 24 N. J. Eq. 243; 13 Amer. Law Reg. 354, note; Rick's Appeal, 105 Pa. St. 528; Russell's Appeal, 75 Pa. St. 269; Minot v. Tilton, 64 N. H. 371, 10 Atl. 682; 2 Pom. Eq. § 845; Tilton v. Tilton, 9 N. H. 385; Kennard v. George, 44 N. H. 440; Ivinson v. Hutton, 98 U. S. 79; Smith v. Jordan, 13 Minn. 246 (264).

The instrument, in so far as it can be claimed that it grants anything to plaintiff, is testamentary and revocable as such. Nearpass v. Newman, 106 N. Y. 47, 12 N. E. 577; 1 Redfield, Wills, p. 5; Turner v. Scott, 51 Pa. St. 126; Evans v. Smith, 73 Am. Dec. 751; Babb v. Harrison, 70 Am. Dec. 203; Conrad v. Douglas, 59 Minn. 498, 61 N. W. 673; Rick's Appeal, supra; Gingrich's Appeal (Pa. St.) 17 Atl. 33; Ex parte Angell, 13 R. I. 630.

Upon plaintiff's own construction he would take at the death of George W. Ewing, Jr., the same estate precisely which he would take by the law of descent. In such case the title by descent prevails over the title by grant, and the grant is a nullity, the reversion remaining in the grantor. A devise to an heir of the same interest which the law gives him is a nullity. Stillwell v. Knapper, 69 Ind. 558; Davidson v. Koehler, 76 Ind. 398; Robertson v. Robertson, 120 Ind. 333, 22 N. E. 310. See Co. Litt. 22b; Washburn, Real Prop. p. 744. "Legal representatives" cannot be construed to mean heirs. Cox v. Curwen, 118 Mass. 198; Warnecke v. Lembca, 71 Ill. 91; Wright v. First Nat. Bank, 7 Cent. Law. Jour. 122; Bowman v. Long, 89 Ill. 22; Hogan v. Page, 2 Wall. 605; Carpenter v. Rannels, 19 Wall. 138; Montgomery v. Landusky, 9 Mo. 714; Phelps v. Smith, 15 Ill. 572; Morehouse v. Phelps, 18 Ill. 472; Wamsley v. Crook, 3 Neb. 344; Grand Gulf R. R. & B. Co. v. Bryan, 8 Smedes & M. (Miss.) 234; Johnson v. Van Epps, 110 Ill. 551; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596. The instrument of revocation was admissible. Minot v. Tilton, supra.

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MITCHELL, J. This case involves the same deed of trust which was considered in Ewing v. Warner, 47 Minn. 446, 50 N. W. 603, and also in Ewing v. Jones, 130 Ind. 247, 29 N. E. 1057, and in Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065, in all of which the courts arrived at the same conclusion, to wit, that the deed in question created a valid trust, in favor of the heirs of the grantor, which could not be destroyed, either by revocation by the grantor, or by the deed of reconveyance by the trustee to the grantor, made, not in execution of the trust, but for the purpose of terminating and destroying it.

In Ewing v. Warner defendants' counsel really admitted that the deed created a valid trust, but contended that, under the facts, the grantor and the trustee had the power to terminate it. Hence, if the question was material, we would not feel bound, by that decision, to hold that the deed created a valid trust. It will be observed however, that in the cases cited the supreme courts of Indiana and Missouri so held where the question appears to have been contested. But in all these cases the defendants rested exclusively upon the terms of the deed of trust and the deed of reconveyance, but here the defendant claims that the deed of trust was unconscionable, and procured by fraud and undue influence on part of the grantee or trustee, and introduced evidence to establish that fact.

The deed of trust was executed in December, 1863, and the deed of reconveyance, by which the parties assumed to terminate the trust, was executed in March, 1866. The deed of trust included about $50,000 worth of property, which the grantor had inherited from an uncle, and which was all the property he owned. The parties were father and son. The son was a young man, between 22 and 23 years of age, without business experience or knowledge, intemperate in his habits, and easily influenced by others. He had neither wife nor children, and hence was without any heirs for whom he might be presumed desirous to make provision. His father was a man of large wealth and force of character, and of strong will, and had commanding influence over his son. The conveyance was made for the nominal consideration of $600, but no consideration was in fact paid.

The evidence tends strongly to prove that the son had no disinterested or independent advice, and that the deed was prepared and executed in the father's office. There was also evidence that the son

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stated that the conveyance was executed as a matter of convenience, to enable the father to transact his business during his absence in California, and with the understanding that, in case he returned, and desired a reconveyance, his father was to make it, and that, when these statements were communicated to the father, he did not deny their truth. Of course, this was inadmissible for the purpose of varying the terms of the deed, but it was competent as tending to prove one of the influences which may have been brought to bear on the son to induce him to execute the deed. The improvident terms of the deed itself are very significant. Here was this boy, without either wife or children, and no certainty that he ever would have any, conveying away this large amount of property,—all he had,—giving to the grantee, as trustee, practically unlimited control of it, to manage, sell, and reinvest as he saw fit, and without any provision for the benefit of the grantor, except that, out of the income and profit, the trustee might expend such reasonable sum as the trustee deemed sufficient for the maintenance of the grantor. Moreover, this deed contained no power of revocation, which, in the case of a voluntary settlement in trust, is viewed as a circumstance of suspicion; and, in such a case, very slight evidence of mistake, misapprehension, or misunderstanding on part of the settlor will be laid hold of to set aside the deed. 1 Perry, Trusts, § 104.

The way in which courts of equity scrutinize and deal with transactions of this nature is too familiar law to require discussion. That equity, so far from enforcing this deed to the father, would have, on the son's suit, set it aside as improvident and unconscionable, seems to us clear, under all the authorities. Had the trust continued to have been administered up to this time, a court might have been justified in refusing to set aside the deed. Certainly, under such circumstances, and after such a lapse of time, the evidence ought to be clear and strong to justify setting it aside. But over thirty years ago, and within a little over two years after the trust was created, the parties terminated it, so far as they could do so, and the father voluntarily did what he ought to have done, and what any court would have compelled him to do, viz. reconveyed the property. Under these circumstances, the plaintiff, who, being the sole heir of the grantor, claims as cestui que trust under the deed, has no equity which entitles him to have the trust upheld and enforced.

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It is immaterial that he was not guilty of any wrongdoing. He is not an innocent purchaser for value; and it is well settled that the fraud or undue influence need not proceed from the recipient of the donor's bounty, but it is equally fatal to the validity of the gift that such fraud or undue influence was practiced or exerted by a third person, as, for instance, by the trustee. When this deed of trust came before the supreme court of Indiana, in a second case, in which it was assailed on the same ground as in this case, that court, upon substantially the same evidence as is before us now, arrived at the same conclusion at which we have arrived, expressed in a very able and exhaustive opinion by the same eminent jurist, Chief Justice Elliott, who delivered the opinion in the first case. Ewing v. Wilson, 132 Ind. 223, 31 N. E. 64.

This really disposes of all the points raised by the assignments of error that are entitled to any special consideration. Possibly some of the findings of fact are in certain particulars stronger than the evidence justified, but the essential findings necessary to support a judgment in favor of the defendants are abundantly justified by the evidence. We do not think that the court committed any error in the admission of evidence. Great latitude is permissible, in a case of this kind, in inquiring into the condition and character of the parties, and all other circumstances having any logical tendency to throw light upon the probable influences which induced the execution of the deed in question. This is especially true where, as in this case, both parties to the conveyance are dead.

Order affirmed.

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JAMES K. VAN DOREN v. J. A. WRIGHT and Another.[1]

June 8, 1896.

Nos. 9997—(116).

Verdict Sustained.

Held, that the evidence was sufficient to justify the verdict.

Granting New Trial—Discretion.

A court might be justified, in the exercise of its discretion, in granting a second trial, on the ground that the verdict was against the evidence, when it would not be justified in granting a third or subsequent trial on the same ground.

Same—Successive Verdicts.

Where there have been four successive verdicts in favor of the same party, three of which had been set aside on the ground that they were not justified by the evidence, it would be an abuse of discretion to set aside the fourth verdict on the same ground, provided it was fairly justified by the evidence.

Instructions—Evidence.

It is prejudicial error to submit a case to the jury upon a point upon which there is no evidence.

Upon Application for Reargument.

June 23, 1896.

Instructions—Exceptions.

Where several separate and distinct "requests," each containing but a single proposition of law, are given, an exception "to each and all of them" is sufficient.

Appeal by plaintiff from an order of the district court for Hennepin county, Elliott, J., granting motion of defendant J. A. Wright to set aside a verdict in favor of plaintiff for $165.25, and for a new trial. Affirmed.

Francis Bergstrom and *Fred. W. Reed*, for appellant.

Wilson & Van Derlip, for respondents.

MITCHELL, J. This action was brought to recover the value of merchandise sold by plaintiff and delivered to third parties upon the

[1] Reported in 67 N. W. 668; 68 N. W. 22.

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order of defendant and his promise to pay for it, the order and promise being made in his behalf by his agent and brother, S. H. Wright. The case was here on a former appeal. 54 Minn. 455, 56 N. W. 51. It has been tried four times, each trial resulting in a verdict for the plaintiff, and in each instance the verdict has been set aside. This appeal is from an order setting aside the verdict, and granting still another trial, on the ground that the verdict was not justified by the evidence.

There has never been any question but that the goods were delivered, that they were of the value alleged, and have not been paid for. The defenses have been—First, that defendant's brother had no authority to order goods delivered to these parties on defendant's credit; and, second, that the brother only ordered goods delivered to the amount and value of $25. There was ample evidence to justify the jury in finding that the goods were delivered on the order of defendant's brother, assuming to act as his agent, and that there was no such limit on the amount to be delivered as claimed by the defendant. It appears that the court granted a new trial exclusively on the ground that there was not sufficient evidence to show that S. H. Wright had authority to order goods to be delivered on defendant's credit, at least not in excess of $25. And from the judge's memorandum he seems to have arrived at this conclusion, not so much on his own judgment, as from the fact that this court, on the former appeal, said that the evidence then before us was insufficient to show S. H. Wright's general agency, and that, in the opinion of the judge, the additional evidence introduced on the last trial added nothing to the strength of plaintiff's case in that respect.

On this last proposition we are compelled to differ from the learned trial judge. On the last trial there was a large amount of evidence, almost entirely lacking on the former trial, tending to show that defendant had, by his previous course of conduct, clothed his brother with apparent, if not actual, authority, as his general agent, to order goods in his name and on his credit. This additional evidence tended, not only to prove apparent authority, but also to corroborate other evidence of actual authority.

While, in our judgment, the evidence was ample to justify the verdict, yet, under the familiar rule of Hicks v. Stone, 13 Minn. 398 (434), the preponderance was not so manifestly and palpably in favor

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of the verdict that we would be justified in holding that the court abused its discretion in granting a new trial, provided there had been but one trial of the case. But there is a limit to this rule, and there must be an end of litigation. A court may be justified in granting one new trial, when it would have no right to set aside several successive verdicts, especially if all were in favor of the same party. It would certainly be error, after four trials, and four successive verdicts in favor of a party, to set aside the verdict, as being against the evidence, provided there is sufficient evidence to fairly justify it. Of course, this rule would not apply, if prejudicial errors of law occurred during the trial, which were duly excepted to, and urged as a ground for a new trial. Unfortunately, this is the condition of this case.

The court instructed the jury that if, after considering all the evidence in the case, they believed that defendant "instructed his brother" "to take Dobson and Calloway into plaintiff's store at Herman, Minnesota, at the time in question, and tell the plaintiff to let those boys have what goods they would want from time to time, and charge them to him," etc., then their verdict must be for the plaintiff for the full value of the goods so sold. There was not a particle of evidence that the defendant ever gave his brother any such instruction, and the court had previously in substance so stated to the jury. How counsel came to ask for, and the court to give, such an instruction, it is difficult to understand. To thus submit the case to the jury upon a point upon which there was no evidence was clearly calculated to mislead them, and was prejudicial error, which entitled the defendant to a new trial. The fact that the court may have granted it upon another and untenable ground is immaterial. One of the grounds upon which a new trial was asked for was errors of law occurring at the trial and duly excepted to.

Order affirmed.

Upon Application for Reargument.

June 23, 1896.

MITCHELL, J. The only ground upon which a reargument is asked for is that there was no sufficient exception to the instruction which we held to be erroneous,—a question not referred to in the opinion heretofore filed. The facts are that plaintiff asked the

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court to give to the jury five separate and distinct requests, each containing but a single proposition of law. The court gave all five of them, adding some explanations and comments on the first and second, but giving the third, fourth, and fifth without note or comment. It was the fourth which we held was erroneous. Defendant's exception was as follows: "Defendant excepts to each and all the requests of the plaintiff that have been given by the court, and the comments made thereon."

According to Rosquist v. D. M. Gilmore Furniture Co., 50 Minn. 192, 52 N. W. 385, and Steffenson v. Chicago, M. & St. P. Ry. Co., 51 Minn. 531, 53 N. W. 800, we suppose that this exception would not be good. But we cannot follow the decisions in those cases to the extent to which they go. The cases cited in the opinions in support of these decisions are not parallel cases, as will be seen by reference to them. Neither are the New York cases cited by plaintiff analogous, notably Walsh v. Kelly, 40 N. Y. 556; Requa v. City of Rochester, 45 N. Y. 129; and Ayrault v. Pacific Bank, 47 N. Y. 570. In each of them there will be found, on examination, a state of facts readily distinguishable from this case. If defendant had said, "I except to the giving of plaintiff's first request, and I also except to the giving of plaintiff's second request," and so on, no one would claim that the exceptions were not sufficiently specific. But why require this tautology? How much more specific is this, or why is it more likely to direct the attention of the court to the error excepted to, than to say, "I except to the giving of each and all of the requests given?"

We therefore hold that, where several separate and distinct requests, each containing but a single proposition of law, are given, an exception to "each of them" is sufficient, and hence that defendant's exception was good as to the fourth request. Whether it would be good as to those requests upon which the court gave comments might be another question, for it might be said that it did not sufficiently indicate whether the exception was aimed at the request or at the comments.

Application denied.

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CHARLES A. CORNMAN v. CHARLES K. SIDLE and Others.[1]

June 8, 1896.

Nos. 10,007—(234).

Obstruction to Execution Sale—What Constitutes.

After the rendition and docketing of a judgment against a debtor in whose name the title to certain land stood of record, he executed a conveyance of the property, in which he "fraudulently" recited that he merely held the title in trust for the grantee, who had always been the beneficial owner of the premises. *Held*, that this recital did not constitute an apparent obstruction to the enforcement of the judgment lien, for the removal of which the judgment creditor could maintain an action.

Appeal by plaintiff from an order of the district court for Hennepin county, Smith, J., sustaining a demurrer to the complaint. Affirmed.

John H. Long and M. H. Boutelle, for appellant.

The mere fact that there is an apparent obstruction, calculated to impress doubt and apprehension in the mind of purchasers and thus prevent them from bidding upon the property, is generally sufficient to warrant equity in decreeing its removal. 2 Freeman, Ex. § 424; Beck v. Burdett, 1 Paige, Ch. 305; Myers v. Hewitt, 16 Ohio 449; Cornell v. Radway, 22 Wis. 251; Fowler v. McCartney, 27 Miss. 509; Gallman v. Perrie, 47 Miss. 131; Tuck v. Olds, 29 Fed. 739; Kugath v. Meyers, 62 Minn. 399, 64 N. W. 1138. The docketing of the judgment perfects the lien and takes the place of the actual levy. Thompson v. Dale, 58 Minn. 365, 59 N. W. 1086; Cornell v. Radway, supra.

Gilfillan, Willard & Willard, for respondents.

MITCHELL, J. The allegations of the complaint are that on February 25, 1895, the plaintiff obtained and docketed in Hennepin county a judgment against the defendant Sidle, which is still unpaid, and upon which execution had been issued and returned unsatisfied; that at the date of the rendition and docketing of the judgment Sidle owned certain real estate in Hennepin county, the absolute ti-

[1] Reported in 67 N. W. 667.

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tle to which stood of record in his name; that thereafter, with intent to hinder, delay, and defraud the plaintiff, he executed to the defendant bank, and placed on record, a conveyance of this land, in which it was fraudulently recited that he had at all times held the title to the premises in trust for the bank; that the bank had paid the consideration therefor, and had at all times been the beneficial owner thereof; that the bank, in accepting the deed, was cognizant of and participated in the fraudulent design of Sidle; that the bank subsequently conveyed to defendant Hunt; that the bank, while it held under the Sidle deed, and Hunt since obtaining the deed from the bank, claimed title to the land free of any lien of plaintiff's judgment. The relief prayed for is that the deed from Sidle to the bank be adjudged fraudulent as against plaintiff, that the lien of his judgment be adjudged prior and paramount to any claim of the bank or Hunt, and that the latter be adjudged to hold the title subject to the lien of plaintiff's judgment. The defendants demurred to the complaint on the ground that it did not state a cause of action. From an order sustaining the demurrer the plaintiff appealed.

Plaintiff does not, and could not, claim that he is entitled to have these deeds set aside; but he contends that this fraudulent recital in the deed from Sidle to the bank, that the bank had always been the beneficial owner of the land, and that Sidle merely held the title in trust for it, amounted to an obstruction calculated to impress doubt and apprehension in the minds of purchasers, and thus prevent them from bidding in the property, and therefore that he was entitled to maintain an action to have the obstruction removed before selling the land on execution, in order that it may realize an adequate price, and thus facilitate and effect the collection of his judgment. There is no doubt of the right of a creditor who has a judgment lien on land to maintain an action to remove an apparent obstruction to the seizure and sale of the property on execution. The most common examples of such obstructions are fraudulent conveyances or incumbrances of the property prior to the docketing of the judgment, by which it is made to appear that the judgment either never became a lien on the land, or, if it did, that it was subordinate to some other lien. An obstruction, in the legal sense of the word, which will entitle a judgment creditor to maintain an action for its removal, does not include everything which the debtor

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or some one else may say or do that may deter bidders at the sale. Any such rule would be entirely impracticable. If once adopted, the courts would be out on a limitless sea, without either rudder or compass. If this alleged fraudulent recital of certain facts had not been contained in this deed, it would not be claimed that plaintiff could have maintained an action on the ground that it was an obstruction to his enforcing the lien of his judgment. But this recital is no operative part of the conveyance. We cannot see that there is any difference in principle between inserting such a statement in the body of the deed and publishing it in a newspaper, or making an affidavit of the same purport, or making the statement orally at the time and place of sale. Would it be claimed that any of these acts would entitle plaintiff to maintain an action like the present? They are acts which might have the effect of deterring bidders, but they are not obstructions to the sale, within the meaning of the law, for the removal of which the creditor can maintain an action.

We note the language of Freeman, Exns. § 424, cited and relied on by plaintiff's counsel; but that the author did not use the term "apparent obstructions" in the broad sense contended for is evident from the cases cited in support of the text, none of which support the contention of counsel. We have also examined all the cases cited by counsel, and in every one of them the "obstruction" was of the character we have suggested. The only two cases which have even the semblance of supporting counsel are Fowler v. McCartney, 27 Miss. 509, and Myers v. Hewitt, 16 Ohio, 449; but an examination of the facts will show that neither of them are in point. In view of the statute of Mississippi that the lien of a judgment, as against bona fide purchasers, expired in five years, in Fowler v. McCartney it appeared on the face of the records that the plaintiff's judgment lien had expired as against the defendant, but in fact it had not, for the reason that the conveyance to him from the judgment debtor was not bona fide, but fraudulent, and without consideration; a matter which rested in pais. In Myers v. Hewitt a condition of things analogous in principle had arisen under a statute of Ohio which provided that, where there is a senior judgment and no levy within a year, and a junior judgment and a levy within a year, the junior judgment should hold against the senior judgment. The action will not lie, and the demurrer was properly sustained.

Order affirmed.

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JAMES L. BYRAM v. JAMES AIKEN and Another.[1]

June 8, 1896.

Nos. 10,067—(246).

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Libel—What Constitutes.

Written publications calculated to expose a person to public contempt and ridicule, and thereby impair him in the good opinion and respect of others, are libelous, although they involve no imputation of crime.

Rule Applied.

The publication constituting the alleged libel considered, and *held* libelous, within this rule.

Appeal by plaintiff from an order of the district court for Redwood county, Webber, J., sustaining a demurrer to the complaint. Reversed.

S. L. Pierce and *John Lind*, for appellant.

John H. Bowers and *Somerville & Olsen*, for respondents.

MITCHELL, J. Written publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous, although they involve no imputation of crime, and are actionable without any allegation of special damages. Holston v. Boyle, 46 Minn. 432, 49 N. W. 203; Dressel v. Shipman, 57 Minn. 23, 58 N. W. 684; Wilkes v. Shields, 62 Minn. 426, 64 N. W. 921. This doctrine is as old as the law of libel itself. Cropp v. Tilney, 3 Salk. 225. In this respect, libel differs from slander, where the law, in respect to our natural passions, gives no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation.

Applying this principle, and construing the language employed in the sense in which people would ordinarily understand it, we think that the article was clearly libelous. The purpose of holding up the plaintiff as an object of ridicule—one of the most potent shafts of

[1] Reported in 67 N. W. 807.

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the libeler—before the public is apparent in every line. The article, by plain insinuation, if not in direct words, charges the plaintiff with disreputable conduct well calculated to impair the good opinion and respect of others towards him. It is written in that bantering and flippant style so well calculated to expose a man to public contempt and ridicule. In several places it applies the prefix "Hon." to plaintiff's name, evidently used ironically, with the apparent purpose of suggesting the idea that the writer meant "dishonorable." It clearly charges the plaintiff, by insinuation, with the dishonorable act, for selfish purposes of his own, of professing a friendship which he did not entertain, for "the possible delegate," and, having thus gotten him "in charge," so generously treating him with intoxicating liquors as to get him into a besotted condition, and then turning him over to his coadjutor at the courthouse, "without warranting his future conduct," where occurred that disgusting scene so artfully touched up by that innuendo, rather than direct statement, which characterizes the whole article. It is perfectly plain that the writer, from start to finish, intended to charge the plaintiff with conduct that was calculated, not only to expose him to ridicule, but also to beget contempt for, and an evil opinion of, him in the minds of all right-thinking people. The claim that the article was an honest and legitimate criticism by a newspaper of the conduct and motives of a candidate for office is palpably sham. The publication related to the plaintiff's private character and conduct, and, being discommendatory, it was uncalled for, and presumably malicious and false. Townshend, Sland. & L. § 130.

Order reversed.

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MINNEAPOLIS THRESHING MACHINE COMPANY v. HERMAN O. HUTCHINS.[1]

June 8, 1896.

Nos. 10,099—(163).

Sale—Acceptance—Effect—Waiver of Delay.

A vendee's acceptance of property in fulfillment of an executory contract of sale is a waiver of the objection that it was not delivered at the time agreed, unless his acceptance is qualified by a reservation of the right to claim damages for the delay.

Appeal by defendant from an order of the district court for Clay county, Baxter, J., denying a motion for a new trial. Affirmed.

W. B. Douglas, for appellant.

Burnham & Tillotson, for respondent.

MITCHELL, J. On August 8, 1891, the defendant ordered from plaintiff a threshing-machine "outfit," to be shipped for him to Fargo, on or about August 15, agreeing to receive the machine on arrival, and settle for the purchase price, before delivery of the property, in cash and notes secured by mortgage on the machine, the plaintiff to have the right to reject or cancel the order at any time before it delivered the goods. The plaintiff accepted the order, and so notified the defendant. If the machine had been shipped on or about August 15, it would have arrived at Fargo on or about August 17. As a matter of fact, it did not arrive at Fargo until about September 12. When it arrived, defendant accepted the machine, and settled for it by giving his notes, secured by mortgage, according to the terms of the contract. When plaintiff brought this action to recover possession of the property on the chattel mortgage, defendant sought to prove damages, equal to the amount due on the mortgage, alleged to have been caused by plaintiff's failure to deliver the machine at the time agreed on.

It is wholly unnecessary to consider the various questions discussed by counsel, as there is another principle of law that is entirely decisive of the case. A vendee's acceptance of the property in

[1] Reported in 67 N. W. 807.

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fulfillment of an executory contract of sale is a waiver of the objection that it was not delivered at the time agreed, unless his acceptance was qualified by a reservation of the right to claim damages caused by the delay, of which no evidence was offered by the defendant in this case. Bock v. Healy, 8 Daly, 156; Baldwin v. Farnsworth, 10 Me. 414; Baker v. Henderson, 24 Wis. 509. Therefore, irrespective of any other questions, the court was right in directing a verdict in favor of the plaintiff.

Order affirmed.

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HEMAN H. PALMER v. BANK OF ZUMBROTA.[1]

June 10, 1896.

Nos. 9759, 9760, 9761, 9762, 9868—(18, 19, 83, 84, 190).

Insolvent Banking Corporation—Action under G. S. 1894, c. 76, §§ 5900, 5901 — Intervention by Creditor to Enforce Liability of Stockholders.

Where a creditor of an insolvent banking corporation institutes an action against it under the provisions of G. S. 1894, c. 76, §§ 5900, 5901, and secures the appointment of a receiver, but fails to take any steps towards bringing the stockholders of the insolvent into the action, any other creditor may, upon an ex parte application to the court, showing the necessity of enforcing the statutory liability of such stockholders, obtain an order allowing him, in his own behalf and in behalf of all other creditors, to intervene and file a complaint making the stockholders parties defendant, and to bring them into the action for the purpose of ascertaining and determining their statutory liability in the same proceeding.

Same—Judgment Determining Insolvency and Appointing Receiver —Complaint in Intervention.

Prior to the application above referred to, an interlocutory judgment or decree had been entered against the bank for want of answer, adjudging it to be insolvent, and confirming the provisional appointment of a receiver and making the appointment permanent. This was alleged in the complaint. *Held* that, if such a judgment was essential, under the provisions of section 5904 (and upon this question no opinion is expressed), the allegations were sufficient.

[1] Reported in 67 N. W. 893.

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Same—One Action.

When a creditor has been allowed, upon application and by order of the court, to intervene and file a complaint, and to bring stockholders into an action instituted under the provisions of sections 5900, 5901, and they have been brought in, there is but one action or proceeding pending. As the insolvent corporation is already a defendant therein, it need not be named as a defendant in the complaint just referred to, nor again be served with a summons.

Same—Amendment of Original Complaint.

After another creditor has been permitted to file a complaint which brings the stockholders into the action, it is too late for the creditor who instituted the action to amend his complaint to the same end.

Cause of Action against One Defendant—Joint Demurrer.

If a complaint states a cause of action against any one of several defendants jointly demurring, an order overruling the demurrer must be affirmed.

Judgment Exceeding Relief Demanded—Appeal.

If a judgment entered in strict accordance with the order of the court for judgment departs from or exceeds the relief demanded in the complaint, the proper remedy is by appeal from the judgment, not by a motion to wholly vacate and set it aside.

Order Directing Receiver to Sue Stockholders—Harmless Error.

In the interlocutory judgment or decree made upon default in the proceedings above mentioned, the receiver was directed to proceed by suit against the stockholders of the insolvent bank to ascertain and determine their statutory liability. *Held* to be harmless error, for reasons stated in the opinion.

Intervening Creditors—When Parties.

Where creditors of an insolvent banking corporation, in accordance with the terms of, and in response to, an order of the court, made and published under the provisions of section 5911, have filed their claims in the shape of an intervenor's complaint, made under oath, they become parties to the proceeding or action. No formal order of the court making them parties is required.

Action in the district court for Goodhue county under G. S. 1894, c. 76, to restrain defendant bank from exercising its corporate rights, privileges, and franchises and for the appointment of a receiver. An order was made appointing a receiver, and afterwards judgment was entered adjudging defendant insolvent, confirming the appointment of the receiver, and granting other relief. In the course of

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the action five appeals were taken from the orders of the court, Crosby, J., as follows: (1) R. P. E. Thacher by leave of court intervened in behalf of himself and all other creditors of defendant, for the purpose of bringing in the stockholders and enforcing their statutory double liability, and from an order denying his motion to set aside the order authorizing the intervention plaintiff appealed. (2) Ed. S. Person and other stockholders, who were made parties defendant by the complaint in intervention, demurred thereto, and from orders overruling their demurrers they appealed. (3) Defendant moved to set aside the judgment entered against it upon the original complaint, and from an order denying this motion, it appealed. (4) Plaintiff moved for leave to file an amended complaint and to bring in the stockholders of defendant for the purpose of enforcing their double liability, and from an order denying this motion he appealed. (5) A motion was made on the part of the intervening creditors to make them parties plaintiff, and from an order granting this motion plaintiff and certain defendant stockholders appealed. Orders affirmed.

J. C. McClure, *Frank M. Wilson*, and *Charles C. Willson*, for appellants.

Smith & Parsons and *Wright & Matchan*, for respondents.

COLLINS, J. The Bank of Zumbrota was organized under the laws of this state, in 1878, with a capital of $50,000. Subsequently it reduced its capital to $25,000. In May, 1893, it suspended payment. On July 15 a meeting of the shareholders was called, and, believing the concern solvent, it was resolved to increase the capital to $45,000 by issuing new stock to the amount of $20,000. Several of the depositors who had not previously been stockholders were induced to subscribe for the new stock, and in payment therefor to surrender certificates of deposit. The balance of the new shares was subscribed for and taken by the old stockholders. Business was resumed, but, on January 15, 1894, the bank again suspended. Heman H. Palmer was a shareholder, holding both old and new stock, and was also a director. He was also a depositor in the bank, and on the day last mentioned commenced an action against the suspended and insolvent institution, under the provisions of G. S. 1894, §§ 5900, 5901. The next day an order of the court was entered appointing

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a receiver, as provided for in section 5902. The receiver at once entered upon the performance of his duties, and still continues to perform the same. The bank did not appear or answer in the action instituted by Palmer, and on February 23, 1895, upon findings of fact, and an order for judgment, made by the court, a judgment or decree against it was entered, adjudging and decreeing that the bank was insolvent, as alleged in the complaint, and sequestrating its estate and property of every nature. The former appointment of the receiver was confirmed by the judgment, and the bank, with all officers, agents, and attorneys, permanently restrained from any further business.

Soon after the appointment of the receiver, in 1894, an order of the court had been made directing all creditors of the insolvent to establish and file their claims within a specified time, and among the creditors whose claims were filed and allowed was one Thacher. He held a certificate of deposit when the bank suspended in 1893, and his claim was based upon a certificate issued in place thereof soon after the bank resumed business with the increased capital and new stockholders. In March and April, 1895, pursuant to an order of the court, the receiver paid to each of the creditors whose claims had been allowed a dividend of 20 per cent. Up to January 11, 1895, none of the persons who first became shareholders in 1893 had complained or objected in any way. On that day several of these persons filed claims against the insolvent estate, setting forth their subscription for shares in July, 1893, their acceptance of the shares in satisfaction of the amounts due upon certificates of deposit, alleging that the shares had been unlawfully issued, offering to surrender the same for cancellation, and demanding that they be treated as creditors to the extent of the amounts paid for the shares. April 25, 1895, Thacher, as a creditor of the estate, presented to the court an application for leave to intervene, and to file a supplemental complaint, in behalf of himself and all other creditors, in the Palmer action, for the purpose of enforcing the double liability of stockholders, and obtained an ex parte order permitting him to file his complaint in the office of the clerk of the court where the proceedings were pending, and to issue a summons to each of the stockholders, requiring each to answer this supplemental complaint. The complaint was filed, and a summons issued and served.

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On June 10, 1895, Palmer appeared and moved the court to set aside its order which permitted and authorized Thacher to intervene, to permit him to file a complaint, and to summon the stockholders to answer the same. In the motion Palmer's attorneys specified three grounds therefor,—the first, that no notice of the application made by Thacher had been served upon Palmer or his attorney; and the second, that Thacher was not entitled to intervene, or to file a complaint in intervention, because judgment had not been entered in the Palmer action. The third ground need not be stated, as it has been abandoned. The court below denied the motion, and Palmer appealed. This is designated the "first appeal."

Among the persons made defendants by Thacher's complaint were Ed. S. Person; George Person; Frederick J. George, as administrator of the estate of Fred George, deceased; Oscar H. Hall, as administrator of the estate of Thomas P. Kellett, deceased; and Harvey Miller, surviving executor and trustee of the estate of Martin S. Chandler, deceased. Miller demurred separately to the complaint, while the balance of the above-named defendants joined in a demurrer. The grounds upon which these demurrers were based were both special and general, and were the same in both cases. Each demurrer was overruled, separate orders being filed by the court, and thereupon a single notice of appeal was served, all of the demurring defendants joining therein, and but one bond on appeal was filed. This is called the "second appeal."

We have stated that on February 23, 1895, a judgment or decree was entered against the bank in accordance with a part of the prayer for judgment in Palmer's complaint. On June 10, 1895, the defendant bank, which had theretofore failed to appear in any manner, moved to vacate and set aside this judgment or decree upon three grounds—First, that it departed from and exceeded the relief demanded by the complaint; second, that it was contrary to law, in that it authorized and directed the receiver to sue the stockholders upon their statutory liability; and, third, that it was also contrary to law, because it authorized the receiver to commence a number of independent actions and did not confine the remedy of the creditors upon the statutory liability to the statutory method of enforcing the same. This motion was denied, and the bank appealed. This is known as the "third appeal."

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On the same day, June 10, 1895, Palmer moved the court for leave to file an amended complaint in the action, and to cause a summons to be served upon the defendants named therein, who were, according to the averments in the pleading, the stockholders in the bank, and the representatives of such as had deceased. This complaint did not differ materially from the one already filed by Thacher, and substantially the same persons were named as defendants. The court denied this motion, and Palmer's appeal is called the "fourth appeal."

The time fixed by the court, upon the motion of counsel for the intervenor, Thacher, within which creditors of the insolvent were required to exhibit their claims and become parties to the actions, expired November 23, 1895. Prior to that day more than 100 creditors had exhibited their claims against the insolvent, in the nature of complaints in intervention, adopting the allegations in the Thacher complaint, and asking to become parties to the action, for the purpose of sharing in the benefits and proceeds of the judgment to be entered. A notice was then served that, on December 12, 1895, a motion would be made before the court for an order making each and all of said creditors parties plaintiff, along with Thacher, the intervenor, the defendants impleaded, and any other person, party to the proceeding, having the right to answer any of said complaints. The order was made by the court December 14, 1895, and Palmer, with two other defendant stockholders, appeal from it. This appeal is called the "fifth appeal." It is also the last appeal, so far as we know.

All of these appeals were argued and submitted at the same time, and will be considered in their order.

1. As to the first appeal, which is from the order refusing to vacate an order, made ex parte, allowing Thacher's intervention in the proceeding, we shall consider the order refusing to vacate a prior order appealable, although there is considerable doubt about it.

It would have been the proper and ordinary practice for plaintiff Palmer to make the stockholders co-defendants with the bank at the outset, for the purpose of ascertaining and determining their liability. National Ger. Am. Bank v. St. Anthony Park North R. E. I. Co., 61 Minn. 359, 63 N. W. 1068. But he failed so to do, nor did he proceed to bring them in, as he might have done, by an amend-

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ed complaint. If, under this condition of affairs, any other creditor desired to have the stockholders made defendants, he had the right so to do by applying for leave, in his own behalf and in behalf of all other creditors, to insert the additional necessary allegations in his petition or proof of claim. See Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 Minn. 386, 67 N. W. 217, in which the practice in proceedings of this nature is laid down. Or, if his status as a creditor is already established by proof, he can, by leave of the court, intervene for the purpose of bringing in the stockholders as defendants. He simply applies for and obtains leave to file a cross bill bringing in parties who have been omitted by the original plaintiff. It is in the discretion of the judge to allow the application ex parte, and in practice this can lead to no abuse, as the order should provide for service of the cross bill on all interested parties.

There is nothing in the contention, made below, that Thacher was not entitled to intervene, and that his complaint was insufficient because he therein failed to allege that a judgment had been entered in the action instituted by Palmer against the corporation; for if, as claimed by counsel, a judgment against the bank in the proceeding itself is essential, under section 5904, as a condition precedent to the filing of a complaint by a creditor other than the one who institutes the action,—and on this we express no opinion,—the complaint filed by Thacher was ample, for it contained an allegation of the entry of the judgment or decree of February 23, 1895, whereby the insolvency of the bank was determined, and the provisional appointment of a receiver confirmed and made permanent, although an erroneous date was given. Section 5904 cannot refer to any other judgment than an interlocutory one which sets at rest the questions of insolvency and the appointment of a permanent receiver. The order appealed from must be affirmed.

2. We now come to a consideration of the second appeal, which, as before stated, is a joint appeal from separate orders overruling two demurrers, in one of which four defendants joined, and in the other there was but a single defendant. One of the grounds assigned in each of these demurrers was that there was another action pending between the same parties for the same cause, namely, Palmer's action against the bank; another ground was that there was a defect of parties defendant, in that the bank was not named as a

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party defendant; and the third ground was that the complaint failed to state facts sufficient to constitute a cause of action.

The first and second grounds of demurrer have really been disposed of by what was said in discussing the first appeal. There was no second action instituted when Thacher filed his complaint and by service of a summons brought the stockholders in to answer. There was and is but one action or proceeding pending,—that instituted by Palmer. The rights of all parties are to be determined and adjusted in that proceeding, the parties having been brought into it by Thacher. No doubt on this point ought to have existed at any time since the decision in McKusick v. Seymour, Sabin & Co., 48 Minn. 158, 50 N. W. 1114. The bank was already a party to the proceeding, had been duly served with a summons, had made no answer, and for over one year its assets had been in the hands of a receiver. It was already a party defendant in the same proceeding. It does not appear whether the cross bill was ever served on it, and the point is not made that it was not.

This leaves for consideration a single question, and that is whether the Thacher complaint stated facts sufficient to constitute a cause of action. It certainly did as to the defendants Ed. S. and George Person, who were alleged to be stockholders; and for this reason alone, if for no other, the joint demurrer was properly overruled. The defendant Miller was brought into the proceeding, by means of the Thacher complaint, as the sole executor of the last will and testament of one Chandler, deceased, who was a stockholder in his lifetime, and as the sole trustee of his estate under said will; it being alleged that, as such trustee, Miller had and held the assets of said estate in his hands. The only assignment of error made by counsel which is special to the Miller demurrer is that the court erred when holding that the cestui que trust under Chandler's will was not a necessary party. The court did not so hold, for the question was not raised by the demurrer. It did hold that, as against the trustee, the complaint stated facts sufficient to constitute a cause of action; and this was clearly right, for, irrespective of the question whether the beneficiaries under the Chandler will should or should not have been made parties, it is evident that the trustee was a proper party, for in no way could the final adjudication of the liability of the Chandler estate be made binding upon the trustee with-

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out making him a defendant. Both of the orders appealed from must be affirmed.

3. We have stated the three grounds explicitly set forth in the motion made by the bank, a denial of which has led to the third appeal. There was no claim that the entry of this judgment or decree was wholly unwarranted. The three grounds on which the bank moved to set aside the interlocutory judgment practically resolved themselves into one. The only respect in which the judgment departed from or exceeded the relief demanded in the complaint was in directing the receiver to sue the stockholders. Originally this was error, as the receiver could not maintain such actions. Allen v. Walsh, 25 Minn. 543. But, before the error was assailed by the defendant bank, this part of the judgment had been, in effect, superseded by the subsequent inconsistent action of the court in allowing Thacher's cross bill, and in bringing in the stockholders under the same. After the stockholders were thus brought into the original suit by order of the court, the receiver was no longer authorized to bring suits against them. Therefore, when the bank made application to have the judgment set aside, the error complained of had in fact already been corrected, and became error without prejudice. This order must also be affirmed.

4. What has been said in respect to the first appeal disposes of the fourth appeal, which was from an order denying Palmer's motion to amend his complaint by setting forth a cause of action against the stockholders, and to bring them into the proceeding. This was exactly what Thacher had already done, by leave of the court, in behalf of himself and all other creditors. Nothing further in this direction would seem to be essential or contemplated by the statute. Palmer had a strict legal right to amend his complaint, and to compel the stockholders to come into the proceeding, and so had every other creditor; but this right could be waived by failing to exercise it. He has no reason to complain if his legal right has been lost by his own neglect.

5. This brings us to the fifth and last appeal. By G. S. 1894, § 5911, the court, whenever necessary or proper, in these proceedings, may order a notice to be published, in a manner prescribed, requiring all creditors of the insolvent corporation to exhibit their claims and become parties within a reasonable time, "not less than six

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months" from the first publication of the order, or be forever excluded from participating in the assets. The order in question was made May 21, 1895. It was published for the first time on May 23, and in terms required the creditors to file their claims, duly verified under oath, in the nature of an intervenor's complaint, in the office of the clerk of the district court in which the proceeding was pending, within six months from said first publication. Over 100 creditors filed their claims in due form within the prescribed time, and also within the time gave notice of a motion for a formal order making them parties. This motion was heard December 12, 1895, and the formal order, involved in the fifth appeal, was filed by the court December 14.

The position of counsel taking the appeal is that the claims were not filed, and the creditors did not become parties to the proceeding within the time fixed by the order or notice, and hence are to be barred from all benefits and from sharing in the proceeds in the receiver's hands; in other words, that within the time fixed by the court all claims must be exhibited, the notice of motion given, and the formal order made. There is nothing in this position, on the facts now before us; for where, in accordance with the terms of the order, and in response thereto, creditors file their claims in the shape of an intervenor's complaint, made under oath, in the clerk's office, they become parties to the proceedings. No subsequent formal order is necessary. But, had it been, there was no abuse of discretion on the part of the court when, under the circumstances, it made its order of December 14, 1895, granting the motion of the creditors that they might be formally made parties.

Each and all of the orders stand affirmed.

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JAMES SLOCUM and Wife v. EDWARD B. BRACY and Another.[1]

June 10, 1896.

Nos. 9827—(30).

Lost Instrument—Secondary Evidence.

A party seeking, upon the trial of an action, to introduce secondary evidence of the contents of an alleged lost instrument, must not only give some evidence that it once existed, but also that a bona fide and diligent search has been unsuccessfully made for it at the place where it was most likely to be found. Whether sufficient search has been made depends much on the nature of the instrument and the circumstances of the case, as a comparatively useless writing may be presumed to have been lost or destroyed on proof of much less search, and after a much shorter time, than an important one.

Same—Receipt in Full.

Held, under the evidence in this case, as to what efforts had been made to find a receipt in full of all accounts and demands to date, said to have been executed by one of these plaintiffs and delivered to the defendants, and to have been lost, that the trial court failed to exercise a sound legal discretion when it admitted, over plaintiff's objection, oral evidence of the contents of the receipt.

Appeal by plaintiffs from a judgment of the district court for Hennepin county, in favor of defendant Bracy, entered in pursuance of the findings and order of Russell, J. Reversed.

Fletcher, Cairns & Rockwood, for appellants.

Edgerton & Wickwire and *T. E. Byrnes*, for respondent.

COLLINS, J. This action was brought on the same contract and to enforce the same liability as was that between the same parties, reported in 55 Minn. 249, 56 N. W. 826, wherein the facts fully appear. In the present action, in which defendant Letcher was not served with a summons, nor did he appear, a trial was had before the court without a jury, and on its findings of fact judgment was ordered against plaintiffs.

As might be expected, the real question in issue was whether plaintiffs accepted the quitclaim deed, executed and delivered by a third person, as a full compliance with defendants' contract to con-

[1] Reported in 67 N. W. 843.

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vey, under which plaintiffs could have required a warranty deed executed in due form by both defendants. This was the pivotal point in the case. Several of the assignments of error are directed to certain rulings of the court when receiving the proofs, while others go to the sufficiency of the evidence to support some of the findings of fact. As we regard the case, the assignments last mentioned need not be considered; for, in our opinion, in at least one instance, there was an erroneous and prejudicial ruling of the court, whereby improper evidence was admitted over plaintiffs' objection. We refer to the ruling whereby the court allowed secondary evidence to be given of the contents of a receipt said to have been executed by James Slocum, one of the plaintiffs, and to have been delivered to the defendants April 6, 1890, at the time of an alleged settlement between the parties.

According to plaintiffs' testimony, and it virtually stood admitted by defendant Bracy, the quitclaim deed had been the subject of a great deal of discussion between these parties from about the time it came into plaintiffs' hands, in October, 1888, until the latter delivered—conditionally, they claim—a deed of their store property to defendants, about May 6, 1890. It was claimed by plaintiffs that they never received the quitclaim deed as a compliance with defendants' contract, but conditionally only,—the condition being that a government patent had been issued or would be issued covering the land,—and that one or both of the defendants repeatedly promised them that, if they retained the deed, and a patent should not be issued, defendants would make good the loss by paying the amount at which plaintiffs took the land, or by conveying to them another quarter section, and that this condition was the subject of frequent conversations down to the delivery of plaintiffs' deed, in May, 1890; and, further, that this condition was insisted upon and was attached to the delivery of the deed last mentioned. That for some months prior to April, 1890, all parties knew that the government refused to issue a patent, was undisputed. Nor was it disputed that, after the fact was known to both parties, plaintiffs insisted that the loss must be borne by the defendants, and must be made good by them. And it was also shown that, after plaintiffs received the quitclaim deed, and soon after the defect in the title was discovered, defendant Bracy acknowledged that the defendants

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had failed to comply with their agreement to convey, insisting, however, that the default must be made good by Letcher, not by himself.

Now, if, during this time, during the period in which plaintiffs claim they were holding this quitclaim conditionally and as agreed upon, and solely because of defendants' promise, if they would so hold it, reimbursement should be made in case the land was lost, the plaintiff James Slocum executed and delivered to defendants a receipt in full of all accounts and demands to date, it would be strong proof that the claim of a conditional acceptance of the quitclaim deed, and the claim that defendants were to make good the loss, if any, were without foundation. In a close case upon this question, it would have a direct bearing upon the issue, and, to say the least, would be very convincing evidence.

As before indicated, the trial court permitted defendants to show by secondary evidence the contents of a receipt of this character, said to have been signed by James Slocum, and to have been delivered to defendant Bracy at the store, which was at Norwood, Carver county, April 6, 1890, when the latter gave his check for a balance due plaintiffs on account of the trade and some other small matters between them, and at which time Bracy testified that he received plaintiffs' deed of the store property. After testifying that Slocum gave him a receipt on this occasion, Bracy stated that he gave the receipt to a clerk in the store, who put it in the safe; that about three months afterwards the store and the safe were sold to another party who took possession, and had since sold out to another man; that the clerk lived at Lester Prairie, in this state; that the witness had written to him about the receipt two or three times, but had received no reply; that he had also written to Letcher, who resided in Alabama, but had been informed that the receipt was not in his possession; that he (the witness) had not looked into the safe, did not think it worth while, and had simply inquired of the party to whom he had sold,—this party himself having sold out the property soon after obtaining it. The question is, giving to the trial court a reasonable discretion on the subject of its ruling, was this testimony sufficient to warrant the substitution of oral for written evidence of the contents of the alleged lost instrument,—James Slocum having denied that it ever existed.

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A party seeking to introduce secondary evidence of the contents of such an instrument must not only give some evidence that it once existed, but also that a bona fide and diligent search has been unsuccessfully made for it at the place where it was most likely to be found. Whether sufficient search has been made depends much on the nature of the instrument and the circumstances of the case, as a comparatively useless writing may be presumed to have been lost or destroyed on proof of much less search and after a much shorter time than an important one. In this case we have an instrument, said to be lost, which, under the circumstances, was extremely important to defendants; for, if produced, it would be very persuasive proof that the quitclaim deed had been unconditionally accepted and retained. If executed at all, it was at a time when, for several months, plaintiffs, according to their testimony, had again and again, and unremittingly, insisted that the deed was not accepted, except upon condition, and that by reason of the failure of title they had a claim and demand upon the defendant for over $1,200. It was a very important instrument, and its value must have been fully appreciated by the defendants. Another writing, the statement, of which we shall speak hereafter, delivered to defendants at the same time, but of much less importance, was carefully preserved, and was produced upon the trial. With this condition of affairs, we think the court failed to exercise a sound legal discretion when it allowed the witness to state the contents of the receipt. It is apparent that he had not made a bona fide or diligent search for the paper. According to his testimony, it had been put in the safe by his clerk, and some effort should have been made to find it there. The witness seems to have been industrious in attempting to find it elsewhere, but he should have been diligent in searching for it in the place where it was last known to be. The fact that he did not think it worth while to look for it there was no excuse for neglecting all attempts to find it there.

But it is contended that, as the witness had testified to a settlement on April 6, and produced a statement on the trial showing the condition of the account between the parties, made by Slocum on that same day, no prejudice could have resulted from the oral evidence as to the contents of the receipt. We cannot concede this. Slocum admitted a settlement on the basis of a perfect title to a quar-

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ter section which he was promised, or the payment of its value in money; but he denied a settlement upon the basis of a formal, unconditional acceptance of the quitclaim deed in lieu of the deed provided for in the contract. He admitted that he made this statement, but claimed it was made under the same conditions as the settlement; and, upon an examination of the statement (defendants' Exhibit 1), in connection with Slocum's testimony, it seems that it was merely a transcript from entries made upon his books of account, wherein he kept a record of this and other transactions with defendants. The first charge, made September 11, 1888, upon the debit side, was the value of the merchandise, store fixtures, store, dwelling, and lot, and the warehouse and scales mentioned in the contract executed the next day, and the first item of credit was a draft for $1,000, upon September 11. And upon this same day, September 11, 1888, defendants were accredited the agreed value of the seven quarter sections of land, although none of it was then conveyed to plaintiffs. We cannot attach any great importance to the statement, under all of the circumstances. And the testimony that a settlement was made April 6, 1890, has much less potency than competent evidence of the execution and delivery of a receipt in full of all amounts and demands to that date would have. A new trial must be had.

Judgment reversed.

MARGARETHE SIEMERS v. ALBERT SIEMERS.[1]

June 10, 1896.

Nos. 9857—(122).

Contract—Expression of Considerat'on—Statute of Frauds.

The reasonable clearness with which the consideration for an agreement, promise, or undertaking in writing must appear, when the consideration is not expressly stated, in order to satisfy the statute of frauds (G. S. 1894, § 4209), cannot be made to depend on what may be conjectured from what has been written.

[1] Reported in 67 N. W. 802.

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Same.

Held, that the consideration for the purported agreement on which this action was based, such consideration not being expressly stated, does not appear with reasonable clearness.

Appeal by defendant from an order of the district court for Brown county, Webber, J., denying a motion for a new trial. Reversed.

Somerville & Olsen, for appellant.

John Lind and *C. A. Hagberg*, for respondent.

COLLINS, J. The parties to this action are husband and wife, having been married July 20, 1894. About July 6 he wrote, in German, signed, and delivered to her a purported agreement, which she has lost; but, as testified to on the trial, it read as follows: "I, the undersigned, herewith promise to pay to the Widow Margarethe Gruenenfelder, on the wedding day when she shall become my wife, the sum of $1,000." The parties separated soon after the marriage, and, alleging in her complaint that the writing was executed and delivered in consideration of her promise to marry defendant, the plaintiff brought this action to recover the amount claimed to be due. She had a verdict, and defendant appeals from an order denying his motion for a new trial.

The only question we find it necessary to discuss lies at the threshold of the right of action, and is whether the consideration for the agreement, promise, or undertaking was sufficiently expressed in the agreement. The statutory provision is imperative in this state, and no action can be maintained on the writing before us unless it has been complied with. G. S. 1894, § 4209. It is not required that what the consideration was shall be expressly stated, but upon what consideration the promise or undertaking was given must appear with reasonable clearness. There was no express statement of the consideration, and, if it appears at all, it must be gathered from the clause, "On the wedding day when she shall become my wife." And counsel for plaintiff concede that it can only be found in this clause by construing it as if written, "On the wedding day, 'if' she shall become my wife." The position is that, with this construction, the consideration would appear with reasonable clearness and would evidently be plaintiff's promise to marry, and her marriage to defend-

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ant. We are not prepared to say that this would not be correct if the clause had been written as counsel ask to have it construed. But it was not, for the word "when" was used instead of the word "if." Upon its face this clause simply fixes the time when the payment shall be made. To be sure, the time would have been fixed with sufficient certainty, had the words "on the wedding day" been used, and nothing further, or had the only expression been "when she becomes my wife." But it does not follow, because both phrases were written, that we should depart from the language used, by substituting one word for another, thus forcing a construction as to what was intended by the promisor. The reasonable clearness with which the consideration for the agreement must appear, when not expressly stated, cannot be made to depend upon what may be conjectured from that which has been written. The order must be reversed, and a new trial granted.

Order reversed.

START, C. J. I dissent. The agreement in question is evidently a homemade one, reduced to writing without the assistance or advice of counsel. It is therefore to be interpreted from the standpoint of the plain, unlettered parties to it, not from that of a technical lawyer. So construing the contract, it appears with reasonable clearness that the consideration for the defendant's promise to pay the plaintiff $1,000 was the marriage of the parties. It must not be assumed that the contract is tautological in its terms, if effect can be given to all of the words used, by any fair construction. It is not a forced or unreasonable construction to hold that the words of the contract "on the wedding day" refer to the time of payment, and the further words "when she shall become my wife" to the condition or consideration of the promise to pay the thousand dollars.

This is manifestly the intention of the parties, as disclosed by the words which they used. Where such is the clear intention of the party using it, the word "when" is construed as the equivalent of "if" in a will or contract. It appears from the record that the parties are Germans, and that their conversation relating to their marriage was carried on in the German language; that the contract was in that language, and seems to have been translated into English by a German. Such being the case, it is probable that the fact, if

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it be one, that in the German language the word corresponding to the English word "when" is frequently used in the sense of "if" explains the use of the word "when" instead of "if" in this contract. But, this aside, I am of the opinion that it appears on the face of the contract that the parties used the word "when" as a word of condition, and in the sense of "if." If any other construction is adopted, no effect can be given to the words "when she shall become my wife."

BUCK, J. I concur in the foregoing views of the CHIEF JUSTICE.

PHILIP SIEBERT and Wife v. ELEANOR QUESNEL and Others.[1]

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June 10, 1896.

Nos. 9860—(91).

Suretyship—Married Woman—Consideration.

Whether a contract executed by a married woman in connection with her husband is one of suretyship, is to be determined by a consideration of whether or not it was made by her upon a consideration running to her, or for the benefit of her estate.

Same—Release of Surety—Failure to Present Claim against Estate of Principal.

When it appears from a contract entered into by a husband and wife that she is simply a surety for the payment of his individual debt, and he dies, leaving an estate amply sufficient to pay and discharge all claims against it, if duly presented and allowed, it is incumbent upon the creditor to present his claim against such estate. If he fails so to do within the period fixed for the presentation and allowance of such claims, the surety is released from further personal liability on the contract.

Action in the district court for Ramsey county to foreclose a mortgage executed by E. Langevin, since deceased, and defendant Eleanor Langevin, his wife, now Eleanor Quesnel. In the judgment of foreclosure, which was entered in pursuance of the findings of Egan, J., it was adjudged that defendant Eleanor Quesnel was personally liable upon the note and mortgage and that plaintiffs

[1] Reported in 67 N. W. 803.

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have execution against her for any deficiency that might arise upon the foreclosure sale. From an order denying a motion to set aside the judgment and for a new trial, defendants appealed. Modified.

J. L. Macdonald, for appellants.

Butts & Jaques, for respondents.

COLLINS, J. There are really but two questions for determination in this cause. First, on the face of the note and mortgage, which are to be considered as one instrument, what were the relations existing between Mrs. Langevin (now the defendant Mrs. Quesnel) and the mortgagee and her assigns? Was Mrs. Langevin a surety for the payment of Mr. Langevin's debt, evidenced by a note signed only by him, or was she simply and strictly a joint principal or obligor? If she occupied the position of a surety, any defense open to her, as such surety, at the time of the assignment of the mortgage to plaintiffs, or which has since arisen, is available in this action, brought to foreclose the mortgage, and to recover from her personally any deficit upon a sale of the mortgaged premises. The second question depends upon the answer to the first, and is: If Mrs. Langevin was a surety, in what manner have her rights and liabilities been affected by the death of her husband, the principal debtor, and plaintiffs' failure to file the note in the probate court, as a claim against the estate, within the time fixed for the presentation and allowance of claims, which expired January 21, 1892, some months after the note and mortgage were transferred to plaintiffs, and more than two years prior to the commencement of this action?

The note was given by Mr. Langevin, alone, for his pre-existing individual debt; and the failure to file it for allowance has barred all right to recover the amount as a claim against Langevin's estate, or to recover as against any of the heirs. Hill v. Nichols, 47 Minn. 382, 50 N. W. 367. This failure amounts to a voluntary release of the claim against the estate of Mr. Langevin, which was more than sufficient to meet and pay all claims against it; and, if his wife was a surety, a voluntary release of the estate of the principal debtor must have had the effect of releasing her from personal liability. The rights of a surety, the fact of suretyship being known to the creditor, are well established by repeated adjudications, and need not be stated here.

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This leads to an inquiry as to the relationship which actually existed between Mrs. Langevin and the mortgagee, of which the plaintiffs had notice in the note and mortgage. Mrs. Langevin joined in all of the covenants contained in the mortgage, binding herself, her heirs, executors, and administrators, including a covenant or condition to pay the sum of money represented by his note, thus becoming obligated to pay the mortgage debt. But primarily it was the debt of Mr. Langevin. This clearly appeared from the note and mortgage, and was actually known to the mortgagee. Mrs. Langevin took no part in the negotiations which led up to the execution of the papers, and had nothing to do with the transaction, except to sign the mortgage and acknowledge its execution when presented to her. The mortgagee's agent, who transacted the business, testified that it was agreed between Mr. Langevin and himself that the wife should join in the obligation of the covenants and the promise to pay, as recited in the mortgage, but it was not claimed that she had any knowledge of this agreement. She did not contract for or receive, either in person or estate, any part of the consideration for the note, nor was her separate property bound in any way for the pre-existing debt which formed the consideration.

It is well settled that a wife is entitled to the ordinary rights and privileges of a surety, where she mortgages her separate estate for the debt of her husband. Wolf v. Banning, 3 Minn. 133 (202); Agnew v. Merritt, 10 Minn. 242 (308), and cases cited. If Mrs. Langevin had mortgaged her separate estate as security for her husband's note, she would have occupied the position of a surety. And, on principle, it can make no difference that, instead of pledging her separate estate to pay the debt, she became personally obligated to pay that debt out of her own funds or estate. Although Mrs. Langevin was a joint principal or obligor, she was also and in fact a surety, and is entitled to all of the rights of a surety, where the principal debtor has been discharged by the creditor's act. If so, it follows that when the estate of the principal debtor was released by the omission of the creditor to file a claim for allowance, it appearing that the estate was abundantly able to discharge the debt in the due course of administration, the surety for that debt was released from any further personal liability.

There is nothing in defendants' claim that because of this omis-

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sion the mortgage security was also discharged, or in the contention that the trial court erred when it directed a separate judgment for plaintiffs' costs and disbursements, as to each, against such of the defendants as were duly notified that no personal claim was made against them, and then answered and took part in the trial. It is evident that they unreasonably defended, and must pay for the privilege. G. S. 1894, § 5867.

There are no other questions presented which need discussion, and the result is that, in so far as the judgment appealed from relates to the personal liability of defendant Eleanor Quesnel for the amount of the debt, it must be modified in accordance with the views herein expressed. As to the remainder of the judgment, it stands affirmed.

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MICHAEL COLLINS and Another v. A. B. McDOWELL and Others.[1]

June 10, 1896.

Nos. 9960—(130).

Negotiable Paper—Transfer—Notice.

The rule that a purchaser of negotiable paper for a valuable consideration, in the due course of business, and before maturity, is entitled to be protected as an innocent purchaser, unless he has knowledge or notice of such facts that his failure to make inquiry amounts to bad faith, applied in a case where the only knowledge or notice was such as was derived from an inspection of the paper itself.

Action in the district court for Otter Tail county by Michael Collins and another, copartners as Citizens' Bank, against A. B. McDowell and others, as makers of a promissory note. From a judgment in favor of plaintiffs for $717.21, after a trial before Searle, J., and a jury, defendants appealed. Affirmed.

Coppernoll & Willson, for appellants.

A. G. Broker, for respondents.

COLLINS, J. The proofs presented by the plaintiffs, on the trial of this action, that they purchased the note in question from the

[1] Reported in 67 N. W. 845.

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payees, for a valuable consideration, in due course of business, before maturity, and without actual notice or knowledge of any defense thereto, were plenary, and no attempt was made to controvert them. If, therefore, it conclusively appeared from the evidence, as a matter of law, that plaintiffs purchased in good faith, and without constructive notice or knowledge of a defense, it was the duty of the court below to direct a verdict in their favor. And unless a want of good faith, and notice or knowledge of a defense, is to be imputed to plaintiffs from the fact that a bank mark or stamp appeared on the face of the note, or because there was an erased indorsement on the back, or because several payments had been made by parties other than the makers, and indorsed on the back, the court did not err when it directed a verdict against defendants at the close of the trial.

The bank mark or stamp referred to seems to have been the words "Wadena State Bank," inclosed in a border, or in brackets. The erased indorsement was the name of the payee, apparently a partnership, preceding which were the words "Without recourse," also erased. Immediately below was the unqualified indorsement of the payee partnership. Then came a memorandum or indorsement of five payments by five different individuals, none of whom signed the note, each for the sum of $33.33,—a total of $166.65.

It is quite probable that the bank mark or stamp on the face of the note would indicate to a purchaser that the note had been in the bank, and of this fact the plaintiffs had actual notice before they purchased. They also had actual notice that, for the purpose of pledging the paper as collateral, the payee firm had indorsed it without recourse; but, as it was refused in that condition, it erased the restrictive indorsement, and made an unconditional one. The mark or stamp, the indorsement and erasure, might be suggestive, and have weight, if the dispute here was over the title to the paper, or the payee's indorsement; but how could it be inferred from any or all of these things that the makers of the note had a defense thereto? And what was there about the memoranda or indorsements of partial payments from which the existence of a defense which might have been available in an action between the original parties should have been inferred, or from which bad faith, or notice or knowledge of such a defense or any equities held by the makers of the note,

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could be imputed to a purchaser for a valuable consideration, in the usual course of business, and before maturity? If it had appeared, directly or indirectly, that partial payments had been made by the makers, it would have impressed the ordinary business man as proof of the negotiable character of the paper, as well as the solvency of the makers. And, if made by other persons, the fair inference would be that such payments were made at the request of, and for the benefit of, the makers. The integrity of the paper would thus be confirmed.

Even if it were the rule that a purchaser of negotiable paper for a valuable consideration, in the due course of business, and before maturity, is required to exercise ordinary prudence in respect to knowledge derived from an inspection of the paper itself, there was nothing in respect to the note in suit which would have supported a verdict for defendants. But the rule is that such a purchaser is entitled to protection as an innocent purchaser, unless he has knowledge or notice of such facts that his failure to make inquiry amounts to bad faith. Merchants' Nat. Bank v. McNeir, 51 Minn. 123, 53 N. W. 178; Merchants' Nat. Bank v. Sullivan, 63 Minn. 468, 65 N. W. 924; Gale v. Birmingham, 64 Minn. 555, 67 N. W. 659.

Judgment affirmed.

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JOHN FLANAGHAN and Another v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[1]

June 10, 1896.

Nos. 9978—(127).

Railroad Company — Action for Fire Set by Locomotive — Instructions.

In an action brought to recover damages caused by a fire alleged to have resulted from the careless and negligent management and operation of one of defendant's locomotives, there being no direct evidence as to the origin of the fire, the court charged the jury that if, from the evidence, they found that the fire started near defendant's right of way soon after a certain train passed, and that there was no other fire in the vicinity except that in the

[1] Reported in 67 N. W. 794.

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locomotive, and no other apparent cause for the breaking out of the fire, they would have the right to infer and find that it was set by the locomotive, but that they "would not be bound to so infer or find, if there is reasonable ground to believe that it may have been started in some other way." *Held* misleading and prejudicially erroneous.

Appeal by defendant from an order of the district court for Winona county, Gould, J., denying a motion for a new trial, after a verdict in favor of plaintiffs for $175. Reversed.

M. B. Webber, for appellant.

P. Fitzpatrick, for respondents.

COLLINS, J. This was a fire case, in which plaintiffs had a verdict. It was alleged in the complaint, and claimed on the trial, that the fire in question was started by sparks and coals thrown from and scattered by one of defendant's locomotives while it was being carelessly and negligently operated along defendant's line of railway. There was no direct evidence that the fire was started by sparks or coals scattered by the locomotive, but the circumstantial evidence tended to establish this, and was sufficient to warrant the jury in so finding. There are several specifications of error, but we shall consider the third only. This challenges the correctness of a part of an extremely long charge to the jury upon very simple issues.

The court, in this charge, after stating that the burden of proof was on plaintiffs to establish their assertion that the fire originated from defendant's locomotive, called attention to the testimony of several of plaintiffs' witnesses to the effect that, on the night of the fire, and shortly before it broke out in some rye stubble near the right of way, when what was known as the "Fast-Mail Train" passed by, they noticed that a large and unusual number of sparks and coals were escaping from the locomotive, and then used the following language:

"The most the court can do to assist you on this branch of the case is to say, and you are so instructed, that if you find, from the evidence, that the fire in question started in the field near the defendant's railroad track a few minutes after the fast mail came down through the plaintiff's farm at the time mentioned, and that there was no other fire than that of the engine in that vicinity at that time, and that there was no other apparent cause for the stubble taking fire, then you would have the right to infer and find the fact to be that the fire was

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set by defendant's engine, but you would not be bound to so infer or find if there is reasonable ground to believe that it may have been started in some other way."

This part of the charge was erroneous and misleading, and constituted prejudicial error, for which a new trial must be granted. The vice in it is found in the concluding expression or statement, which was that the jury would not be bound to infer or find, from the circumstantial evidence before adverted to by the court, that the fire started from the locomotive, if there was reasonable ground for believing that it might have started in some other way; or, to put the statement in a different form, the only way open to the jury to escape this inference or finding as to the origin of the fire was by concluding that there was reasonable ground for believing that it might have started in a different manner.

It was incumbent upon plaintiffs to show, to the satisfaction of the jury, and by a preponderance of evidence, that the fire originated with defendant's locomotive. Failing in this, they could not make out a case; and, until a case was made out on this essential point, defendant was not obliged to introduce any evidence whatever; and the necessity of maintaining a preponderance of evidence on this issue was upon plaintiffs all through the trial. To meet and overcome a case made by plaintiffs as to the origin of the fire, defendant was not compelled to show that it started from some other cause or in some other way than that claimed. It might rebut and destroy the plaintiffs' proofs in various ways other than by introducing evidence tending to account for the fire through some other agency than the locomotive. The defendant was not absolutely required to introduce evidence upon which could be based a reasonably grounded belief that the fire was started in some other way than by the locomotive, in order to have a finding in its favor on this particular point. The instruction was misleading and erroneous, in that the jury might easily have understood it as directing them to infer and find that the fire was set by the locomotive, if the evidence failed to satisfactorily account for its origin in some other way.

Order reversed.

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HENRY WAGNER v. ANDREW J. FINNEGAN.[1]

June 10, 1896.

Nos. 10,008—(119).

Covenant of Warranty—Constructive Eviction.

Where a covenantee in a deed containing the usual covenant of warranty surrenders and abandons possession of the land conveyed because a paramount title has been asserted against him in the courts by the holder thereof, and such title has been adjudged valid, his right of action for a breach of the covenant is complete. A surrender and abandonment of possession under such circumstances is a constructive eviction.

Same—Judgment of Paramount Title—Surrender of Possession.

Held, upon the evidence in this case, that the trial court erred when denying plaintiff's motion for an additional finding as to whether he and another person surrendered possession and ceased to occupy the land by reason of the entry of judgments determining that the holder of the paramount title was the owner thereof in fee simple, and that they had no title or interest therein.

Action in the district court for Hennepin county for breach of covenant. The case was tried before Elliott, J., who found as facts substantially as follows: That October 4, 1881, defendant, in consideration of $750, conveyed, with covenants of seisin and warranty, the undivided half of a certain forty acre tract to one Schuppel; that March 20, 1885, Schuppel, in consideration of $1,500, conveyed part of the land to plaintiff; that May 16, 1887, one Windom brought an action against Schuppel, and another action against plaintiff, in which actions judgment was entered July 21, 1888, in favor of Windom, adjudging him to be owner of all said lands and determining in his favor all adverse claims of Schuppel and plaintiff; that defendant was duly notified of the commencement of said actions and was duly requested by Schuppel to defend the same; that Schuppel in 1891 assigned to plaintiff his claim against defendant for damages sustained by reason of the failure and breach of said covenants in said deed; that during all the times above mentioned Windom was owner of all said lands in fee simple; that after the conveyance to him Schuppel entered into and continued in actual possession of the

[1] Reported in 67 N. W. 795.

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land until after his conveyance to plaintiff, after which he remained in possession of the part of the land not conveyed by him to plaintiff until after the recovery of the judgments above mentioned; that after the conveyance by Schuppel to plaintiff, plaintiff entered into and continued in actual possession of the part conveyed to him until after the recovery of said judgments; and that the present action was commenced in 1891. As conclusions of law, the court found that the causes of action in favor of plaintiff and of Schuppel against defendant for breach of covenant of seisin contained in the deed by defendant to Schuppel were barred by the statute of limitations; that the facts found were not sufficient to constitute an eviction or ouster; and that defendant was entitled to judgment. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

George R. Robinson, for appellant.

Savage & Purdy, for respondent.

COLLINS, J. After an order overruling a general demurrer to the complaint in this action was reversed on appeal (54 Minn. 251, 55 N. W. 1129), the complaint was amended, and an answer interposed in which the execution and delivery of the deed to Schuppel was admitted, and also that defendant had no title to the land conveyed. Defendant also set up the statute of limitations in bar of recovery. A trial was had, and upon its findings of fact the court ordered judgment in defendant's favor. The plaintiff's counsel then moved for two additional findings of fact, and the motion was denied. Subsequently the court denied plaintiff's motion for a new trial.

The facts alleged in the original complaint are briefly stated in the opinion on the former appeal. They were there construed as failing to show a breach of the covenant of seisin or of warranty, and these defects in the complaint were cured by amendment. At the conclusion of the trial the court made its findings of fact, and, so far as they went in that direction, they were ample to sustain an order for judgment on a breach of the covenant of warranty. Among other things, the court found that, when Windom commenced his actions, plaintiff and Schuppel were in possession of their respective tracts of land, and that each so remained in possession until after judgments were entered quieting the adverse claims made by them to the land, adjudging Windom to have been the owner in fee when defendant's

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deed to Schuppel was executed and delivered, and to have continued thereafter to be the owner. As conclusions of law the court found that an action on the breach of the covenant of seisin was barred by the statute of limitations, and that the facts found were insufficient to constitute eviction or ouster from the premises, and therefore plaintiff could not recover. The further findings of fact sought to be obtained by the motion were, in substance: First, as to whether plaintiff and Schuppel surrendered possession or ceased to occupy the land, and, if so, at what time; and, second, whether the surrender or discontinuance of occupation was on account or by reason of the Windom judgments. And, as already stated, the trial court refused further findings.

Defendant's counsel contend, upon appeal, that plaintiff was not entitled to either of these findings, because a mere surrender of possession or a discontinuance of previous occupation, without a further finding that the surrender was to Windom, or, at least, to somebody, would not amount to an eviction or ouster, and therefore the proposed findings would be immaterial, if made. It was not essential for the court to find that plaintiff and Schuppel surrendered possession to Windom, or to any other person. Actual surrender to some particular individual was no more necessary, in order to obtain a right of action on the covenant, than was an actual eviction or ouster. The law on this subject was well and fully stated in Ogden v. Ball, 40 Minn. 94, 41 N. W. 453. An outstanding superior title to the premises existed when defendant deeded, and while plaintiff and Schuppel were in possession under the deed there was a hostile assertion of the paramount title by the holder, in the nature of actions to determine adverse claims, of which actions defendant was duly notified, and required to defend. It was not incumbent upon plaintiff or Schuppel, after the entry of judgment in these actions, and in defiance thereof, to persist in claiming to be the owners, refuse to abandon the premises, and await actions in ejectment and eviction by legal process. It had been formally adjudged in these actions that Windom was the owner of the land in fee, and an abandonment of possession in consequence of the judgment constituted constructive eviction therefrom. And the right of action on the covenant became complete when there was constructive eviction.

The second of the findings asked for was not well drawn, but what

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was desired by counsel seems plain. If the court had found that plaintiff and Schuppel surrendered possession and ceased to occupy the land by reason of the Windom judgments, no doubt would arise as to what effect should be given the finding. In substance, it would be equivalent to a finding that plaintiff and Schuppel surrendered and abandoned their possession and occupancy because Windom had asserted his paramount title in actions brought against them, and his title had been sustained and adjudicated upon in his favor. If the evidence on this point was conclusive in plaintiff's favor, he was entitled to an affirmative finding to that effect. If, upon the other hand, there was evidence which would have warranted such a finding, the court should have found one way or the other, and this it declined to do. To say the least, there was an abundance of evidence to support a finding in plaintiff's favor, and it was error for the court to refuse to pass upon the question.

Order reversed, and new trial granted.

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F. E. WATKINS v. EMILIE GOESSLER.[1]

June 16, 1896.

Nos. 9783—(87).

Mortgage—Negotiability.

Evidence considered, and *held* insufficient to justify the finding and order of the trial court.

Appeal by defendant from an order of the district court for Polk county, Ives, J., denying a motion for a new trial. Reversed.

Albee Smith and *C. E. Vanderburgh*, for appellant.

A. A. Miller, for respondent.

BUCK, J. This action was brought to foreclose a mortgage upon a quarter section of land situate in Polk county, in this state, made by Emilie Goessler to Elsie Weber to secure the payment of a promissory note described as follows, viz.: "$500.00. Minneapo-

[1] Reported in 67 N. W. 796.

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lis, Minn., April 1st, 1889. Three years after date I promise to pay to the order of Elsie Weber five hundred dollars, at Minneapolis, Minnesota, value received, with interest before and after maturity at the rate of ten per cent. per annum until paid. Interest payable semiannually. Emilie Goessler." The note was given by the defendant to Elsie Weber to be used by her as her share of the capital of a co-partnership of which James Williams, Theodore England, Elsie Weber, L. A. Nevitt, and F. H. Townsend were members, doing business at Minneapolis, Minnesota, under the name and style of the Minneapolis Kitchen Cabinet Company, which firm was formed about April 1, 1889, and dissolved the last of June, 1889. Elsie Weber is the daughter of Emilie Goessler.

After the delivery of the note and mortgage to Elsie Weber, she indorsed the note and assigned the mortgage to James Williams, treasurer, and one of the partners of the firm, to be by him used as a part of the capital of said company, and delivered the same to him. The note and mortgage therefore belonged to the partnership, although, for convenience, it was put in the name of its treasurer, Williams, as trustee. On June 6, 1889, when Williams resigned as treasurer, he transferred them to the president, T. England, also as a trustee for the partnership. Soon afterwards,—although the exact date does not appear,—T. England embezzled and appropriated them to his own use, by assigning them to W. H. England, who, if not a party to the fraud, was at least cognizant of it, because, knowing that the note and mortgage belonged to the partnership, he applied the greater portion of it in payment of a debt which T. England individually owed him; and therefore W. H. England was not an innocent purchaser. Neither of the Englands informed the other partners of the assignment. In ignorance of this assignment, and supposing the note and mortgage were still in the hands of T. England as their trustee, the partners, late in June, 1889, dissolved the partnership, and made a division of the assets among the partners, by the terms of which this note and mortgage were to be satisfied and destroyed, and surrendered to Elsie Weber as the equivalent of her share. On this state of facts, Elsie Weber, or her accommodation mortgagor (the defendant, Goessler), could have compelled W. H. England, if he still held the note and mortgage, to surrender them and discharge them of record. Defendant did bring such an action,

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and obtained such a judgment, which failed to be effective because of the alleged unrecorded assignment to plaintiff, who was not made a party to the action.

These facts constitute a good defense to the mortgage, which is not negotiable, although the note is clearly a negotiable instrument on its face. This court has steadily adhered to the rule that the negotiable character of the note is not thereby imparted to the mortgage which secures its payment, and consequently the mortgage is not free from the immunities or privileges which attach to the secured negotiable note. Johnson v. Carpenter, 7 Minn. 120 (176); Hostetter v. Alexander, 22 Minn. 559; Oster v. Mickley, 35 Minn. 245, 28 N. W. 710; Redin v. Branhan, 43 Minn. 283, 45 N. W. 445; Smith v. Parsons, 55 Minn. 520, 57 N. W. 311. While, so far as the personal liability of the mortgagor on the note is concerned, the assignee may, if an innocent purchaser, before maturity and for value, take it free from the equities, the mortgage in his hands is subject to them. Tiedeman, Com. Paper, p. 533, § 305.

The ninth finding of fact, viz. that, at the time of the sale of the note and mortgage by T. England to W. H. England, the said T. England had the lawful right and authority, as a member of said company, to sell and dispose of the same free of any defense on the part of the maker thereof, is unsupported by the facts, and the evidence is directly to the contrary. As parties to whom the mortgage was assigned prior to the assignment to Watkins could not deprive the defendant of an equitable defense in this action, it is evident that upon well-settled principles, and upon the facts disclosed herein, Watkins, being a purchaser of a chose in action (the mortgage), took it subject to the equities between the original parties, and that his assignor could give no better title than he himself had. There must therefore be a new trial as to the mortgage.

While this might be done, and a new trial denied as to the note, if the facts warranted such a procedure, yet there is evidence tending to show that the plaintiff was not a bona fide purchaser of the note as well as of the mortgage. His evidence and that of W. H. England are very suspicious, and strongly indicate that the two were in collusion. Watkins testified that he could not tell where he got the money to pay for the note and mortgage, and was unable to state what kind of money—whether currency or not—he paid him, and that

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he paid him $400 for the note, while the note at that time, including interest, amounted to about $700,—although paying less than face value for the note would not of itself be sufficient to charge him with notice of any infirmity. Again, it appears that, at the time when plaintiff's deposition was taken, the note was still in possession of W. H. England, and it is doubtful if it was delivered to the plaintiff at the time of the alleged purchase. Plaintiff and W. H. England both agree that the latter assured Watkins that he had examined the land and investigated its value, and that the security was perfectly good, and that there was no possible question as to the payment of the note, yet England sells and Watkins purchases this gilt-edge security for about 60 per cent. of its actual value. Plaintiff made no inquiry as to why such a heavy discount was made, no inquiry about the parties, and no information appears to have been given by England. There are very many more earmarks of bad faith on the part of both seller and purchaser, indicating collusion, which we need not specify.

In its seventh finding of fact the trial court states "that at the time of said sale T. England represented to W. H. England that the money then paid by the said W. H. England was for the benefit and use of said company," but this finding is evidently a mistake, as it is entirely unsupported by the evidence.

As a new trial must be granted as to the mortgage, we think that, under the circumstances, a new trial should be ordered of the whole case. So ordered.

Order reversed.

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STATE OF MINNESOTA v. SAMUEL CODY.[1]

June 16, 1896.

Nos. 9852—(64).

Uttering Forged Instrument—Indictment.

G. S. 1894, § 6702, provides that "a person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, or disposes of, or puts off, as true, or has in his possession, with intent so to utter, offer, dispose of, or put off, * * * a forged will, deed, certificate, indorse-

[1] Reported in 67 N. W. 798.

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ment, record, instrument, or writing, or other thing, the false making, forging, or altering of which is punishable as forgery,—is guilty of forgery in the same degree as if he had forged the same." *Held*, that an indictment charging the defendant with having fraudulently and feloniously uttered and disposed of a forged instrument, then knowing the same to be forged, but omitting the words "as true," is insufficient.

Error to the district court for St. Louis county. Defendant was convicted of the crime of uttering a forged instrument. A motion in arrest of judgment was denied by the court, Ensign, J., and defendant was sentenced to confinement in the state prison for five years and one month. Reversed.

John H. Norton, for plaintiff in error.

George E. Arbury and *H. W. Childs*, for defendant in error.

BUCK, J. The defendant, Samuel Cody, was convicted in the district court of St. Louis county upon an indictment accusing him of having committed the crime of uttering a forged instrument. The indictment is in the following words and figures, viz.:

"The said Samuel Cody on the twelfth day of January, A. D. 1895, at the village of Virginia, in the said county of St. Louis and state of Minnesota, fraudulently and feloniously did utter and dispose of, to one Mike Mitchell, with intent then and there to defraud the said Mike Mitchell, a certain false and forged instrument in writing, purporting to be a check made by Mitchell & McClure, which false and forged instrument was in words and figures as follows, to wit: 'Duluth, Minn., 1–11–1895. No. 32. National Bank of Commerce of Duluth: Pay to Joe Bush, or bearer, $49.00 (forty-nine dollars). Mitchell & McClure.' That the said Samuel Cody then and there well knew, when he so uttered and disposed of said instrument, that the same was false and a forgery; that the false making is punishable as forgery. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota."

The defendant demurred to this indictment upon two grounds: First, that it does not set forth facts sufficient to constitute a public offense, under the statute; second, that it does not substantially conform to the requirements of G. S. 1894, § 7241, as the same are qualified by section 7247. The demurrer was overruled, and upon a plea of not guilty, and a trial, he was convicted as above stated. On March 12, 1895, he was sentenced to be confined in the state prison at Stillwater, at hard labor, for a period of five years and one month.

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A motion in arrest of judgment was denied by the trial court, and the case came here upon a writ of error.

The provision of the statute under which this indictment was found is as follows:

"A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, or disposes of, or puts off, as true, or has in his possession, with intent so to utter, offer, dispose of, or put off, * * * a forged will, deed, certificate, indorsement, record, instrument, or writing, or other thing, the false making, forging, or altering of which is punishable as forgery,—is guilty of forgery in the same degree as if he had forged the same." G. S. 1894, § 6702.

Section 7241 requires that the indictment shall be direct and certain, as it regards—First, the party charged; second, the offense charged; third, the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. The vice alleged against this indictment is that it does not allege that the defendant uttered and disposed of, as true, the instrument described in the indictment. We are of the opinion that the objection is well taken. The words "as true," in the statute, are significant. They constitute one of the three essential elements of the crime as defined by the statute, which are (1) a knowledge that the instrument is forged or altered; (2) an intent to defraud; (3) the offering or disposing of it as true.

It is claimed by the state that the allegation of the indictment that the defendant uttered the check, knowing it to be forged, with intent to defraud, includes the charge that he uttered it as true, because, if he disposed of it with intent to defraud, he must have disposed of it as true. It is useless to speculate as to the matter, for the statute makes, not only the intent to defraud, but an uttering of the instrument as true, one of the elements of the crime; and the allegations of the indictment must be direct and certain, not argumentative, as to this ingredient of the crime. The indictment therefore should have directly charged that the defendant uttered and disposed of the written instrument as true, as required by the statute. No equivalent words are charged in the indictment. In the case of Benson v. State, 5 Minn. 6 (19), the defendant was indicted for uttering or passing counterfeit bank bills, but the indictment failed to charge that the defendant uttered or passed these bills as true or genuine, and the indictment was held insufficient. In the case of

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People v. Stewart, 4 Mich. 655, the defendant was indicted for having in his possession ten counterfeit bank bills, with intent to utter and pass the same, knowing that the bills were false, forged, and counterfeit. The statute [2] under which the indictment was found made such possession criminal only when they were so possessed with intent to utter or pass the same, or render the same current as true. The omission of the words "as true" from the indictment was held fatal. Hence we are of the opinion that the indictment in this case does not charge the defendant with having committed a public offense.

The conviction is therefore set aside, the judgment reversed, the case remanded, and the trial court directed to enter judgment that the defendant be discharged, but without prejudice to the right of the district court in its discretion to resubmit the defendant's case to another grand jury; and in case it so decides to hold the defendant, to admit him to bail, or in default thereof to commit him to jail to await the action of another grand jury.

ST. PAUL TRUST COMPANY, Administrator, v. ANNA R. MINTZER.[1]

June 16, 1896.

Nos. 9867—(146).

Life Estate — Payment of Taxes by Administrator with Will Annexed—Receiver—Sale.

The life tenant in a homestead estate neglected and refused to pay taxes or make repairs thereon for many years, and to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having the power so to do by the express terms of the will. *Held*, that such administrator might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of the property, and apply the proceeds to pay the taxes and necessary expense of repairs, and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or necessary expense for repairs necessarily made to save the property; and that, if such rental is insufficient, the receiver may, under authority and direction

[1] Reported in 67 N. W. 657.

[2] Rev. St. 1846, c. 155, § 8.

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of the trial court, proceed to sell the life estate of the defendant in the premises, or so much thereof as may be sufficient for such purpose.

Appeal by plaintiff from an order of the district court for Ramsey county, Brill, J., sustaining a demurrer to the complaint. Reversed.

Harvey Officer, for appellant.

Plaintiff, as administrator with the will annexed, and under the tenth subdivision of the will, is entitled as against defendant to the possession of the real estate. It may be conceded that an administrator could not be entitled to the reversion, against the life tenant; that in such case the heir at law, only, could obtain judgment of forfeiture and eviction for waste; and that an executor under a will, even if it contain a power of sale of the real estate, for the purpose of paying debts or legacies, would be in the same condition, as to the reversion. Sutphen v. Ellis, 35 Mich. 449; Page v. Davidson, 22 Ill. 112. But under the tenth subdivision of the will none of the real estate was devised to any of the persons therein named. The will must be construed as a devise in fee to the executors by implication. It creates a lawful trust under G. S. 1894, § 4284. 1 Perry, Trusts, c. 4, § 112; G. S. 1894, §§ 4276, 4277, 4373; Ness v. Davidson, 45 Minn. 424, 48 N. W. 10. The facts alleged constitute an abandonment of the homestead. Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119; Russell v. Speedy, 38 Minn. 303, 37 N. W. 340; Baillif v. Gerhard, 40 Minn. 172, 41 N. W. 1059; Quehl v. Peterson, 47 Minn. 13, 49 N. W. 390; Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862. Defendant's estate for life has become a matter of record, and the trustee cannot sell this property, either under a license of the probate court to pay expenses of administration or in exercise of the power, for the purpose of division of the proceeds, until it shall have not only possession, but have the record cleared from her apparent life estate. Defendant is a debtor to plaintiff to the extent of the adjudicated balance. Plaintiff is entitled to judgment for treble damages under G. S. 1894, § 5882.

Stevens, O'Brien, Cole & Albrecht, for respondent.

The right of action and the remedy given by G. S. 1894, §§ 5879, 5882, 5883, conform with slight modification to the technical com-

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mon law action of waste. Section 5879 extends the right of action to a reversioner notwithstanding an "intervening estate for life or years." The common law gave the right of action to him, only, who had an immediate estate of inheritance. Peterson v. Clark, 15 Johns. 205; Greene v. Cole, 2 Saunders, 252 (note). Section 5582, so far as this action is concerned, is identical with the statute of Gloucester, which extended the scope of the action of waste. Parrott v. Barney, Deady (U. S. C. C.) 408, Fed. Cas. No. 10,773a. The right of action is given to "any person injured by the waste." But sections 5879 and 5882 alone show that within the provision of the statute the person injured is the reversioner or remainderman. The party injured must have an interest in the estate, and that interest must be that of a reversioner or remainderman. Peterson v. Clark, 15 Johns. 206; Perrine v. Marsden, 34 Cal. 17; 6 Wait, Act. & Def. 251; Bliss, Code Pl. § 33; 3 Blackstone, 223. The word waste, as used in the statute, is undoubtedly used in its strict technical sense and signifies an act which amounted to waste at common law where a privity of estate existed. The statute does not define waste, therefore resort must be had to the common law. Benson v. State, 5 Minn. 6 (19). Plaintiff has no estate in remainder or reversion. Defendant has an absolute unconditional estate for life. McCarthy v. Van Der Mey, 42 Minn. 193, 44 N. W. 53; Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973. Plaintiff has "no title to or interest in the real estate." Wilson v. Proctor, 28 Minn. 16, 8 N. W. 830; Noon v. Finnegan, 29 Minn. 420, 13 N. W. 197; Hill v. Townley, 45 Minn. 167, 47 N. W. 653. The will does not give the executor an estate in reversion or remainder. The allegation in the complaint of a reversionary interest is but a conclusion of law. Preston v. Smith, 26 Fed. 888. The tenth subdivision of the will contains no word of grant, and it is unnecessary to give the executor an estate by implication. The testator's intention can be carried out without reading anything into the will. Schauber v. Jackson, 2 Wend. 33. The testator left heirs, and the fee is in them. Jackson v. Schauber, 7 Cow. 197; Taylor v. Benham, 5 How. (U. S.) 269. The interests of the trustees cannot be broader than the duties imposed. Farmers' Nat. Bank v. Moran, 30 Minn. 165, 168, 14 N. W. 805. The land is not devised to plaintiff. The will contains no words of grant. The law will not imply an unnecessary estate.

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The executor takes a general power in trust defined in G. S. 1894, § 4322. See Perry, Trusts, § 308, and cases cited; Sutphen v. Ellis, 35 Mich. 449; Page v. Davidson, 22 Ill. 112. A creditor, even with a specific lien upon land, cannot bring an action of waste. He may bring an action on the case in the nature of waste, which is nothing but an action for damages for a tort caused by waste, or he may enjoin the commission of waste. Tiedeman, Real Prop. § 351; 2 Washburn, Real Prop. (5th Ed.) 139.

BUCK, J. William L. Mintzer died February 23, 1883, at the city of St. Paul, Minnesota, leaving a will, which was duly probated, and one John Jones, one of the executors named in the will, duly qualified as such, and entered upon the discharge of his duties, but he died about May 4, 1886, leaving the will unexecuted, and on or about June 11, 1886, this plaintiff was duly appointed by the probate court of Ramsey county as administrator de bonis non with the will annexed, and duly qualified and entered upon the discharge of its duties, and ever since has been, and now is, acting as such administrator. Mintzer left surviving him a widow, but no issue. The will has been so far executed that all the just debts and demands existing against him at the time of his death have been paid in full, and all specific legacies of money or personal property and all lawful devises of specific real estate have been paid and satisfied in full, save and except that the tenth subdivision of the will has not been executed. The tenth subdivision reads as follows:

"All the rest, residue, and remainder of my estate I give, bequeath, and devise as follows: I direct my executors to take charge of the same, collecting the rents, paying all taxes, assessments, and charges thereon, and to make report of all their doings to the probate court of Ramsey county, Minnesota, at least once a year. The balance in their hands, if anything shall remain of said rents after paying the charges aforesaid, shall be distributed to the persons entitled to the real estate as hereinafter provided. I wish this to continue during the life of my nephew, William Mintzer, son of George Mintzer, and the life of George A. Hicks, provided, however, that at the expiration of ten years from my death, if either or both of said parties, William Mintzer and George A. Hicks, should be living, nevertheless the property may be sold by the executor or their successors, and the proceeds divided among my nephews and nieces hereinabove named, viz. Sarah Mintzer, daughter of Adam Mintzer (married to one Clough), George, Charles, Fred, John, Amelia, Josephine, Maggie, Charles, Charles Titus, Dr. William Titus, Almira Egbert, and the

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children of Adam Snyder one share, except and provided that I wish one lot in Dunwell & Spencer's addition to West St. Paul to be given and conveyed to Charles Flynn, aforesaid, his heirs and assigns; the selection of the lot to be left to my executors, but I request them to give him one of the best."

The ten-years limitation provided for in the will for the division and distribution of the estate expired on February 23, 1893, at which time the plaintiff fully accounted to the probate court for all business and transactions performed by it in behalf of the estate, and said court, on March 13, 1893, by its decree and judgment duly made and entered in the matter of said estate, duly decreed and adjudged that there was then due and owing to this plaintiff, as such administrator, for taxes, assessments, and other lawful charges, disbursements, and expenses of administration, a balance and sum of $16,750.69 over and above all moneys by it then had and received. There was no money or personal property belonging to said estate wherewith the said balance due this administrator could be paid, and the devisees and legatees under said will, including this defendant, failed, neglected, and refused to pay said balance, or any part thereof, and by reason thereof no final decree assigning and awarding the said estate to the persons entitled thereto was made, or could be lawfully made, in the matter of said estate in said probate court.

By reason of the nonpayment to plaintiff of such balance, it was necessarily compelled, against its wishes, to exercise the duties as such administrator; and upon a subsequent accounting in said probate court it was decreed and adjudged that there was due upon said estate to this plaintiff, as such administrator, the sum of $20,143.02. There was not, and is not now, any money or personal property belonging to said estate in the hands of this administrator, and there is no real property belonging to said estate except one small house or shanty, the rents whereof were and are nominal, and do not exceed the sum of $60 per annum, and except the homestead tract, which consists of 30 acres and $^{36}/_{100}$ of an acre, particularly described in the plaintiff's complaint, and of which the testator died seised in fee, at which time there were valuable tenements, improvements, fences, and buildings, to wit, a dwelling house, barn, and outhouses thereon, and which premises, prior to the time of his decease, were occupied by the testator and his wife as a homestead, and which premises the defendant, as the widow of the testator, continued to hold as a

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homestead until about March 10, 1891, at which time she removed from said homestead to another dwelling house in the county of Ramsey, where she has ever since continuously resided, and occupied the same as her homestead, having rented her first-described homestead to tenants not members of her family, and received the rents and income therefrom, but has wholly failed and neglected to pay the taxes assessed thereon, amounting to the sum of $2,507.04, for the years 1885 to 1890, inclusive, which plaintiff, as such administrator, was compelled to pay to save said homestead from tax sale for taxes, penalties, costs, charges, and expenses; said taxes having been so paid also under the order and authority of the probate court of Ramsey county, and at the request of the reversioners.

The unpaid taxes, costs, and penalties upon said homestead now due for the years 1891 to 1894, inclusive, amount to $2,321.91, which have not been paid by this plaintiff for want of funds. The defendant has also, ever since she became entitled to the right and use of said premises as a homestead, refused and neglected to keep the buildings, fences, and other improvements thereon situated in proper repair, and has suffered the same to become dilapidated and out of repair. The plaintiff paid said taxes upon the said estate at the written request of all persons interested therein except this defendant, first exhausting all rentals received from other premises for such purpose, and made the advances to save such estate. The reasonable market value of said homestead does not exceed $23,100, and in the present condition of the real-estate market it would not sell for a sum exceeding $10,000; and the defendant, while having ample means outside of said homestead to pay the taxes thereon and keep the same in repair, refuses and neglects to do so. The defendant still collects the rental from said homestead, which is continually depreciating in value, and is not adequate security for the taxes paid and unpaid thereon.

The relief asked is for an accounting; that the value of defendant's life estate in the premises be ascertained; that a receiver be appointed of said premises; that the defendant be enjoined from leasing or collecting rents from said homestead; that her life estate be adjudged terminated, or her homestead right adjudged forfeited; and that the names of persons now in possession as tenants be disclosed, that they may be made parties herein.

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A demurrer was interposed to the complaint upon three grounds: (1) That the plaintiff had not the legal capacity to sue; (2) that several causes of action are improperly united; (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained upon the ground that the facts alleged in the complaint do not show that the plaintiff is entitled to the reversion of the real estate so as to entitle it to an eviction, and because the facts pleaded do not show that the plaintiff is a creditor of the defendant, and that the facts pleaded as an abandonment do not operate as such in favor of the plaintiff.

The facts pleaded, however, do show the very strongest grounds for equitable relief. We regard the certain persons named as beneficiaries in the tenth subdivision of the will as reversioners, within the legal or equitable definition of that term. But we do not consider the abandonment of the homestead by the defendant, and her subsequent acquirement of another, at all material. She had only a life estate in the premises, and it was therefore her duty to pay all taxes properly assessed against them. This she refused or neglected to do. Upon the death of John Jones, the executor, this plaintiff was appointed administrator with the will annexed of the estate not administered. G. S. 1894, § 4453, provides that the term "executor" in this Code shall be construed to include an administrator with the will annexed. Referring again to the tenth subdivision of the will, we find that it was the duty of the executor to take charge of all the rest, residue, and remainder of the testator's property not specifically devised, collect the rents, pay all taxes, assessments, and charges thereon, and make report to the probate court of Ramsey county at least once a year. The duties of the administrator in this respect were those of a trustee, and, whatever plaintiff did in this respect in regard to paying taxes upon the homestead, it was not as a volunteer, but performing a duty specifically enjoined by the terms of the will itself. When the defendant refused or neglected to pay the taxes for years upon the homestead, and there was danger of the premises being thereby lost to the reversioners, the homestead fell within the provision in the will, viz. "all the rest, residue, and remainder of my estate," which it was plaintiff's duty to save if the life tenant was guilty of not paying the taxes thereon.

The reversioners were under no obligations to pay taxes, or protect

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the property as against waste by reason of nonrepairs, so far as concerned the life estate of the defendant. That was the duty of the defendant herself, for the law is too well settled to need discussion that a tenant for life of real estate is compelled to pay taxes and the expense of repairs out of the rents and profits, whether such life estate comes by will, conveyance, or operation of law, unless the life tenant voluntarily pays them out of other funds. In this case, if the life tenancy ceased by reason of the death of the defendant or otherwise, the reversioners would be entitled to take the fee, unless, after the death of the testator's nephews William Mintzer and George Hicks, subject to the right of the trustee to sell the premises, and divide the proceeds among the nephews and nieces of the testator, as specifically provided by the terms of the will. Of course, a power may be granted by devise in a last will and testament. G. S. 1894, § 4334. And the trust conferred by the terms of the will upon the executor was valid as a power, and, this being so, the acceptance of the trust made the duty of the trustee co-ordinate with the power conferred. One of the duties or trusts expressly enjoined by the will was that the executor should collect the rents and pay taxes, and, the plaintiff having been duly substituted in place of the executor as administrator with the will annexed, it was its duty to use due diligence in this matter. 2 Perry, Trusts, § 527. The power of an administrator with the will annexed to perform the duty conferred upon the executor by the terms of the will is expressly authorized by G. S. 1894, § 4464, viz.: "To perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

The right of the plaintiff to be reimbursed out of the life estate does not rest upon the fact that she has abandoned it as a homestead, but upon the broader ground that, she having failed to pay the taxes thereon and to keep the same in repair, and having thereby allowed it to depreciate in value, with great danger of entire loss to the reversioners, it became the duty of the plaintiff, under the terms of the will, to discharge this duty, and for the expense so incurred it is entitled to be reimbursed out of the life estate. These taxes were paid at the request of all of the reversioners, and with the approval of the probate court; and while these facts do not constitute plaintiff's authority for so doing, they materially aid in show-

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ing its good faith. Therefore, assuming that it was the duty of the life tenant to keep down the taxes, to keep the premises in repair, and also preserve the property from decay to the extent, at least, of the rental value of the premises, she having neglected and refused to do so, the plaintiff is entitled to have a receiver appointed to collect the rents sufficient in amount to discharge the liabilities of the life tenant's estate for which she is answerable. Murch v. Smith Mnfg. Co., 47 N. J. Eq. 193, 20 Atl. 213; Cairns v. Chabert, 3 Edw. Ch. 330. In the latter case a bill in equity was sustained against the life tenant to restrain the disposition of property, and to compel the tenant to keep down assessments and taxes; and upon motion an order was entered for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off the taxes in arrear, unless within 40 days from the service of a copy of the order the tenant should show to the satisfaction of the master that the taxes had been paid. This case is cited with approval in Phelan v. Boylan, 25 Wis. 679.

If the life tenant permits the premises to decay for want of repair, and neglects to pay the taxes, subjecting the estate to sale therefor, with accumulated costs and penalties, it must diminish the value of the estate, and thus there is a resulting, lasting damage to the freehold or inheritance, and this constitutes waste. Stetson v. Day, 51 Me. 434; Phelan v. Boylan, supra; 1 Washburn, Real Prop. 107. But, although the defendant has been guilty of permissive waste, we do not think that it is such waste as would constitute an absolute forfeiture of the estate, and therefore the action does not come within the provisions of G. S. 1894, §§ 5882, 5883. But the facts alleged constitute substantial ground for relief in equity, and entitle the plaintiff to protect the inheritance, and, if possible, have it restored to the condition it would be in if the defendant had not been guilty of wrongdoing.

Our conclusion is that, while the plaintiff is not a remainder-man or reversioner, so as to entitle it to maintain a common-law action of waste, yet it is entitled to maintain this action for equitable relief; to have a receiver appointed, as prayed for in the complaint; to have an accounting of all rentals received by defendant and taxes paid by plaintiff, as well as the amount of unpaid taxes ascertained, and of the amount necessary to make repairs to save the property

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from loss to the reversioners; and that, if the same, with necessary expenses, are not paid by the defendant within a reasonable time, to be fixed by the trial court, the life estate of the defendant in the homestead premises described in the complaint may be sold by decree and judgment of the trial court to reimburse the plaintiff for all such necessary disbursements, and to pay the unpaid taxes on said premises and keep them in repair; and to have an injunction against defendant that she be restrained from collecting any more rentals of the premises until the further order therein of the trial court.

The order sustaining the demurrer is overruled, and the cause remanded, with instructions to the trial court to proceed in the matter not inconsistently with the views herein expressed.

MARY A. BROWN v. BENJAMIN F. BAKER and Another.[1]

June 16, 1896.

Nos. 9874—(177).

Mortgage Foreclosure—Affidavit of Costs—Time for Filing.

Held, following Johnson v. Northwestern L. & B. Assn., 60 Minn. 393, that the provisions of G. S. 1894, § 6051, which require a party foreclosing a mortgage, or his attorney, to make and file, within ten days thereafter, an affidavit of the amount paid or incurred for attorney's fees and disbursements, are mandatory.

Same—Action to Recover Costs—Limitation.

The mortgagor is not limited to a time within one year in which he may bring an action to recover from the owner of the mortgage the costs, disbursements, and attorney's fees included in the mortgage foreclosure sale, where an affidavit, as provided in G. S. 1894, § 6051, is not filed. The one-year limitation, under section 6052 of said statute, is only applicable where the mortgagor seeks, in his complaint, to recover the penalties embraced in said section.

Appeal by defendants from an order of the district court for Hennepin county, Russell, J., sustaining a demurrer to parts of the answer. Affirmed.

[1] Reported in 67 N. W. 793.

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S. A. Reed and *Young & Lightner*, for appellants.
Smith, Pullam & Smith, for respondent.

BUCK, J. In 1891 the plaintiff mortgaged to defendants certain land in the city of Minneapolis. The mortgage contained the usual power of sale and on default was foreclosed by advertisement. The sale took place August 30, 1893, the defendants being the purchasers. The price bid was $8,810. The amount then due for principal and interest was $8,576.61. The residue of the bid was the amount of expenses of sale, viz. $200 attorney's fees, and other expenses, to the amount of $33.39,—in all $233.39. No affidavit of disbursements was ever filed. The plaintiff brought this action, in August, 1895, in the district court for Hennepin county, to recover the sum of $238.39, on the sole ground of the omission to file the affidavit required by G. S. 1894, § 6051. The defendants answered and pleaded the one-year statute of limitations, found in G. S. 1894, § 6052, and also that said section 6051 is in violation of the federal constitution, as impairing the contract contained in the mortgage. The plaintiff demurred to each of the defenses, the demurrer was sustained by the trial court, and the defendants bring this appeal.

The appellants did not press the constitutional question, either in their brief or oral argument, but attacked the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. This they had a right to do, upon the ground that the first defective pleading can be reached upon such a demurrer. But we do not feel that it is our duty to review the question of whether said section 6051 is mandatory as to filing an affidavit within ten days after foreclosure sale. It was so held in this court in Johnson v. Northwestern L. & B. Assn., 60 Minn. 393, 62 N. W. 381, and in Brown v. Scandia B. & L. Assn., 61 Minn. 527, 63 N. W. 1040, and in Larocque v. Chapel, 63 Minn. 517, 65 N. W. 941.

Appellants also contend that the one-year limitation in which actions of this character are brought should apply, and cite G. S. 1894, § 6052. They cite no authorities in support of this contention. This question was raised, and briefly discussed, and quite as briefly disposed of, in Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730, against the contention of these appellants. This action is not brought under section 6052. No penalty is claimed in the complaint. This

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section authorizes an action to be brought, at any time within a year after foreclosure, to recover of the owner three times the amount of any costs or disbursements not absolutely paid for the foreclosure, and three times the amount of any bonuses or interest, over twelve per cent., embraced in the foreclosure, and for which the property was sold, unless such overplus has been paid to the mortgagor or his assigns. In Eliason v. Sidle, supra, it was held that the right to bring an action of this character pre-existed the statute, and that section 6052 gave a new remedy. We are of the opinion that the mortgagor is not limited to a time, within one year, in which he may bring an action to recover from the owners of the mortgage the costs, disbursements, and attorney fees included in the mortgage sale, where an affidavit, as provided in G. S. 1894, § 6051, is not filed. The one-year limitation under section 6052 of said statute is only applicable where the mortgagor seeks in his complaint to recover the penalties embraced in said section.

Order sustaining demurrer affirmed.

DWIGHT E. WOODBRIDGE v. JOSEPH SELLWOOD and Others.[1]

June 16, 1896.

Nos. 9907—(155).

Action on Contract—Defense of Illegality—Pleading.

Where the illegality of a contract is relied upon as a defense, but does not appear by the plaintiff's complaint, it must be pleaded by the defendant's answer, showing such a state of facts that no recovery can be had thereon.

Appeal—Review.

Issues of law or fact not passed upon by the trial court will not be decided by this court upon appeal.

Prohibitory Statute—Proof of Applicability.

A party relying upon a prohibitory statute should prove affirmatively and distinctly the facts which render the prohibition applicable, and not leave them to mere inference.

[1] Reported in 67 N. W. 799.

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Appeal—Presumption.

There being no settled case or bill of exceptions, it will be presumed that interest was allowed upon sufficient evidence.

Appeal by defendants from a judgment of the municipal court of Duluth in favor of plaintiff, entered in pursuance of the findings and order of Edson, J. Affirmed.

McGiffert & McCaffrey, for appellants.

A. C. Finney and *Fryberger & Johanson*, for respondent.

BUCK, J. The plaintiff sued to recover for services alleged to have been rendered for the defendants at their request. He alleges that the services were reasonably worth $150, and that in the performance thereof he necessarily expended the sum of $96. Upon these two amounts the defendants have paid the sum of $50. It appears that on January 21, 1894, some eight or ten persons, including these defendants, met at the Spalding Hotel, in the city of Duluth, and requested and employed this plaintiff to go to the city of Washington as the bearer of certain figures and statistics concerning the iron interests in and about the city of Duluth, and also to carry a petition, signed by citizens of said place and St. Louis county, respecting the tariff on iron ore, all of which was to be by plaintiff presented to the Minnesota delegation in congress. Plaintiff performed these services solely upon the request of said persons, and in accordance with the terms of his employment. The defendants refused to pay their share of such expenses and value of the services so rendered, and the plaintiff brought this action in the municipal court of Duluth, and recovered a judgment therefor in the sum of $190.88, including costs and interest from January 29, 1894. This appeal is from such judgment, and there is no settled case or bill of exceptions.

The allegations in the complaint are to the effect that plaintiff performed the services and made the expenditures at the request of defendants, and performed the services as requested; that defendants promised to pay plaintiff therefor, but had not done so, except the sum of $50. The answer is a general denial. It is a fair inference from the finding of facts by the trial court that the services so rendered by the plaintiff were performed on secular days of the week, although the court finds that the request to perform such services

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was made on January 21, 1894. Although this court will take judicial notice that January 21, 1894, was Sunday, yet it does not take judicial notice that the validity or invalidity of a Sunday contract was an issue involved and litigated on the trial of the action. Such question is only necessarily considered when raised and determined by the trial court, and so appears from the record. The invalidity of the contract does not appear from the allegations of the complaint or answer, and the presumption is that the evidence sustained the findings of fact of the trial court upon the issues raised by the pleadings. Assuming it to be true that the request for the performance of the services was made on Sunday, yet the services were to be, and in fact were, rendered on secular days, and payment made in part therefor on such days, and the defendants nowhere in the court below assailed the contract as an invalid one. Nor did the trial court decide as to the validity of the Sunday negotiation of employment of plaintiff, and it does not appear that either party asked it so to decide. That question, for the first time, is raised in this court, not upon the allegations in the pleadings, nor upon the evidence, but upon the bare finding of the trial court that the request or contract was made January 21, 1894, which was Sunday.

Where the illegality of the contract is relied upon as a defense, but does not appear by the plaintiff's complaint, it must be pleaded by the defendants' answer, showing such a state of facts that no recovery can be had thereon. Maxwell, Code Pl. 445; Abbott, Tr. Ev. 789; Goss v. Austin, 11 Allen, 525. In the latter case it was held that illegality of a contract which is the subject of an action cannot be relied upon in defense, unless it appears by the declaration or is specially pleaded in the answer. It is familiar law that the statutory prohibition against Sunday contracts is grounded upon principles of public policy, and if the defendants were more conscientiously impressed with their duty to resist, upon such grounds, the enforcement of this contract, than their moral obligation to pay an honest indebtedness, they should have alleged in their answer the facts constituting such invalidity, and required a decision of the court upon it. From all that appears in the record, we may properly assume that the decision was based upon the validity of the contract, the allegations in the pleadings and evidence, as conceded by the de-

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fendants. This being so, the question cannot for the first time be raised here.

In White v. Western Assur. Co., 52 Minn. 352, 54 N. W. 195, this court held that [2] "it is a rule that generally this court will not decide a cause upon an issue of fact or law not presented to and passed on by the trial court; and that, where it is unquestionable that the party tried his cause upon one theory, either of the facts or the law, in the court below, he will not be permitted to shift his ground, so as to present an entirely different theory here." It seems to us unquestionable that the defendant tried his case upon the issue of whether the contract was in fact made, and whether the services were performed thereunder, and that the decision of the trial court was based thereon. Upon the pleadings, we do not see how any other issue could have been tried. Certainly, if the defendant intended to defeat the recovery by plaintiff, he should not have left all the facts rendering the statutory prohibition applicable to mere inference. They should have been proven affirmatively and distinctly.

Upon the question of interest allowed by the trial court, amounting to about $15, which accrued before the commencement of the action, we do not find any evidence; and it is to be presumed that there was sufficient evidence to support the finding of the trial court in this respect, as every intendment is to be taken in favor of the regularity of the judgment appealed from, in the absence of apparent error.

In order to avoid misapprehension, we do not wish to be understood as impliedly conceding that since the adoption of the Penal Code, in 1885, a contract made on Sunday is for that reason invalid.

These views of the case render it unnecessary to decide any other question discussed by the respective counsel, and lead to an affirmance of the judgment. So ordered.

[2] At page 354.

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AMERICAN SAVINGS & LOAN ASSOCIATION v. FARMERS & MERCHANTS STATE BANK and Others.[1]

June 16, 1896.

Nos. 10,084—(278).

Insolvent Banking Corporation—Action under G. S. 1894, §§ 5900–5903—Necessity of Prior Judgment.

Under G. S. 1894, §§ 5900–5903, a creditor of a corporation having banking powers may, without having obtained a judgment at law against it, maintain an action, in behalf of himself and all other creditors who may choose to become parties thereto, against the corporation, to obtain the relief provided by said sections.

Same—G. S. 1894, § 5904.

Section 5904 of the same statute merely extends the remedy to such creditors as may choose to proceed to judgment against the corporation before resorting to the equitable proceeding provided by statute.

Appeal by defendant Williamson from an order of the district court for Hennepin county, Belden, J., overruling his demurrer to the amended complaint. Affirmed.

Davis & Pierce, for appellant.

The complaint is insufficient from failure to allege that plaintiff has recovered judgment against the bank, and that execution has issued and been returned unsatisfied. G. S. 1894, § 5897. The creditor must exhaust his legal remedy before he can maintain an action in equity. 1 Cook, Stock & Stockh. § 200, and cases cited; 5 Thompson, Corp. §§ 6561, 6563; Bank of U. S. v. Dallam, 4 Dana (Ky.) 574; 5 Thompson, Corp. § 6559; Jones v. Green, 1 Wall. 330; Rocky Mt. Nat. Bank v. Bliss, 89 N. Y. 338; Handy v. Draper, 89 N. Y. 334. The insolvency of the corporation will not excuse the creditor from pursuing his remedies and securing a judgment against the corporation, and having an execution thereon returned unsatisfied. Walser v. Seligman, 21 Blatch. 130, 13 Fed. 415. G. S. 1894,

[1] Reported in 67 N. W. 800.

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§§ 5898, 5905, must be construed together. Klee v. E. H. Steele Co., 60 Minn. 355, 62 N. W. 399; McKusick v. Seymour, Sabin & Co., 48 Minn. 158, 50 N. W. 1114. In the construction of statutes courts must look at the language of the whole act. Williams v. People, 17 Ill. App. 274; Thompson v. Bulson, 78 Ill. 277; James v. Du Bois, 1 Harrison (N. J.) 285; Opinion of Justices, 22 Pick. 571. A statutory remedy must be strictly pursued. Sutherland, St. Const. §§ 392, 393, and cases cited; Preist v. Essex H. M. Co., 115 Mass. 380, 382; In re Peoples L. S. Ins. Co., 56 Minn. 180, 57 N. W. 468; Merchants Nat. Bank v. Bailey M. Co., 34 Minn. 323, 25 N. W. 639.

Young & Lightner, who filed a supplemental brief by consent, for appellant.

The so called double liability of stockholders is purely statutory liability and is not known at common law. G. S. 1894, c. 76, provides the statutory remedy, and this is exclusive. Being statutory, it must be strictly complied with. Allen v. Walsh, 25 Minn. 543; Fourth Nat. Bank v. Francklyn, 120 U. S. 756, 7 Sup. Ct. 757. It is a statutory condition precedent in proceedings under chapter 76 to enforce the double liability of stockholders and directors that a judgment should be obtained and execution returned thereon unsatisfied. Klee v. E. H. Steele Co., 60 Minn. 355, 62 N. W. 399. The condition precedent can only be dispensed with in a case where it is impossible to obtain a judgment and have execution issued and returned unsatisfied. The rendition of a judgment and return of an execution unsatisfied is a necessary prerequisite, even though the corporation has been adjudged a bankrupt or has gone into insolvency. Fourth Nat. Bank v. Francklyn, supra; National T. W. Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165; Swan L. & C. Co. v. Frank, 148 U. S. 603, 612, 13 Sup. Ct. 691; Shellington v. Howland, 53 N. Y. 371, 375; Kincaid v. Dwinelle, 59 N. Y. 548; Cuykendall v. Corning, 88 N. Y. 129, 137; Handy v. Draper, 89 N. Y. 334; Rocky Mt. Nat. Bank v. Bliss, 89 N. Y. 338; Hardman v. Sage, 124 N. Y. 25, 34, 26 N. E. 354; Hunting v. Blun, 143 N. Y. 511, 38 N. E. 716; Hirshfeld v. Bopp, 145 N. Y. 84, 39 N. E. 817; Priest v. Essex H. M. Co., 115 Mass. 380; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292; Patterson v. Lynde, 112 Ill. 196; Walser v. Seligman, 13 Fed. 415. A judg-

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ment can be obtained and execution issue thereon. Smith v. St. Paul G. F. Ins. Co., 56 Minn. 202, 57 N. W. 475.

Fred. W. Reed, for respondent.

G. S. 1894, § 5897, does not apply to an action under this chapter against a corporation having banking powers. Olson v. Cook, 57 Minn. 559, 59 N. W. 635; Walther v. Bank, 58 Minn. 434, 59 N. W. 1077; Adler v. Milwaukee P. B. M. Co., 13 Wis. 63; Mann v. Pentz, 3 N. Y. 415; Cleveland v. Marine Bank, 17 Wis. 562; Merchants Bank v. Chandler, 19 Wis. 457; Allen v. Walsh, 25 Minn. 543; State v. Educational E. Assn., 49 Minn. 158, 51 N. W. 908; State v. Knights of Aurora, 49 Minn. 165, 51 N. W. 909. Whether the purpose of a judgment and execution be to show that the corporation is insolvent, or that there are no assets of the corporation to satisfy the demand, so that it is necessary to resort to the stockholders' liability, both facts are admitted, and judgment and execution would be meaningless and idle acts. Or if the purpose is to show that the legal remedy is exhausted, it is admitted plaintiff has no other remedy than this action, and the requirement would be equally idle. Such useless acts are not required. Brackett v. Rich, 23 Minn. 485; Klee v. E. H. Steele Co., 60 Minn. 355, 62 N. W. 399; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335; Shickle v. Watts, 94 Mo. 420, 7 S. W. 274; Morgan v. Lewis, 46 Oh. St. 1, 17 N. E. 558; Barrick v. Gifford, 47 Oh. St. 180, 24 N. E. 259; Bronson v. Schneider, 49 Oh. St. 438, 33 N. E. 233; Younglove v. Lime Co., 49 Oh. St. 666, 33 N. E. 234; Peter v. Foundry Co., 53 Oh. St. 534, 42 N. E. 690; Shellington v. Howland, 53 N. Y. 371; Hunting v. Blun, 143 N. Y. 511, 38 N. E. 716; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Hirshfeld v. Bopp, 145 N. Y. 84, 39 N. E. 817; Thompson, Liab. Stockh. § 321; Paine v. Stewart, 33 Conn. 516. The rule that the legal remedy must be exhausted before proceeding against the equitable assets of the debtor, or against his sureties, does not apply: (1) Because the stockholders' liability is not an asset of the corporation; (2) because this indebtedness is original, and not collateral to that of the corporation. In re People's Live Stock Ins. Co., 56 Minn. 185, 57 N. W. 468. This indebtedness of the stockholders is primary and absolute and not that of a surety. Coleman v. White, 14 Wis. 762; Merchants Nat. Bank v. Chandler, 19 Wis.

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457; Davidson v. Rankin, 34 Cal. 503; Young v. Rosenbaum, 39 Cal. 646; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Gebhart v. Eastman, 7 Minn. 40 (56); Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263.

BUCK, J. There is but one material question raised by the demurrer in this case, viz.: Was it necessary to allege, in the complaint, that the plaintiff had recovered a judgment against the defendant bank, issued execution thereon, and had the same returned unsatisfied before commencing this action?

The facts alleged in the complaint are substantially as follows: The Farmers & Merchants State Bank, organized under G. S. 1878, c. 33, had for several years prior to June 20, 1893, carried on a general banking business. On June 19, having become utterly insolvent, it closed its doors, ceased to do business, and made a general assignment to the Northern Trust Company for the benefit of creditors, under Laws 1881, c. 148, and acts amendatory thereto. At this time it was indebted to various parties, and had been for more than a year prior thereto, in a sum exceeding $200,000, and its entire assets did not exceed $40,000. In December, 1893, respondent, holding a claim of $20,000, commenced this action, under G. S. 1878, c. 76, on behalf of itself and all other creditors who should come in, to enforce the statutory liability of stockholders. All of the stockholders were named as parties defendant, though a large number of them are nonresidents, over whom no jurisdiction could be obtained in this action. The entire capital stock at the time of the assignment, and for more than one year prior thereto, was $75,000. It appears, specifically, that the entire assets of the bank are not sufficient to pay more than 10 per cent. on the amount of claims duly proved and filed with the assignee. It also appears that, if the entire amount for which all the stockholders are liable was recovered, it would not be sufficient, added to the assets, to pay the indebtedness of the bank. It is specifically alleged in the complaint that the said defendant, Farmers & Merchants State Bank, is wholly and hopelessly insolvent, and has no property of any kind whatsoever that may be levied on or attached, or that can be reached by any order, writ, or process of this court, or otherwise, and from which plaintiff's said debt can be satisfied, in whole or in part, and the said

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defendant bank has no property or assets whatsoever, except such as are in the hands of the assignee. A single defendant [appellant] demurred to the amended complaint. The court overruled the demurrer, and from that order this appeal is taken.

The complaint prays that the assignee in the insolvency proceedings, or some competent or suitable person, be appointed receiver, for the purpose of collecting and enforcing the statutory liability against the stockholders, and for certain other relief not necessary to specify. The action is brought supplementary to such insolvency proceedings, and, if the assignee in such proceedings is appointed receiver herein, he can proceed in aid thereof, and not in hostility thereto. The demurrer admits all of the material allegations of the complaint, one of which is that the Farmers & Merchants State Bank is a corporation, having banking powers, and that it is insolvent, and made an assignment for the benefit of its creditors, and refuses to pay its notes and debts on demand, and that it has no property subject to levy or attachment.

We have no hesitancy in holding that these proceedings may be instituted under G. S. 1894, §§ 5900, 5901, and such proceedings continued under sections 5902, 5903, and that, too, without any previous recovery of a judgment, issue of execution, and return of no property found.

Section 5900 is explicit, that "whenever any corporation having banking powers, or the power to make loans on pledges or deposits, or authorized by law to make insurances becomes insolvent, or unable to pay its debts, or neglects or refuses to pay its notes or evidences of debt on demand * * * the district court may, by injunction, restrain such corporation and its officers from exercising any of its corporate rights, privileges and franchises and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering, to any person, any of the moneys, property or effects of such corporation until such court shall otherwise order." Section 5901 authorizes the injunction to be issued upon the complaint of the attorney general, or on the complaint of any creditor or stockholder of such corporation, with the right to prosecute the same. Section 5902 provides that the court, in any stage of the proceeding, may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect,

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sue for, and recover the debts and demands that are due, and the property that belongs to such corporation, who shall in all respects be subject to the control of the court. Section 5903 provides that, if such application is made by a creditor of any corporation whose directors or stockholders are made liable by law for the payment of such debts in any event or contingency, such directors or stockholders, or any of them, may be made parties to the action, either at the time of filing the complaint, or at any subsequent stage of the proceedings, whenever it becomes necessary to enforce such liability. These sections authorize proceedings of the character brought by the plaintiff, independent of any other provisions of the statute. Insolvency, inability, refusal, or neglect to pay its notes or debts, by a corporation having banking powers, gives the attorney general, a creditor, or stockholder the right to proceed in the manner provided by these sections, and to the extent therein provided, without any reference to any other provisions of the statute.

This being a proceeding against a corporation having banking powers,—in fact, against an incorporated and organized bank itself,—the case of Klee v. E. H. Steele Co., 60 Minn. 355, 62 N. W. 399, does not aid the contention of the appellant that there should first be a judgment at law, and execution returned nulla bona. That was a case where the corporation was organized under the general laws of the state for the purpose of dealing in real, personal, and mixed property, but it had never been engaged in anything but merchandising, and it is there held that, as to such corporation, sections 5897 and 5905 must be construed together, in an action to sequestrate the property and have a receiver appointed, and that a creditor of such corporation must first exhaust his legal remedy, as required by G. S. 1894, § 5897. But it is also there said that banking and insurance companies are excepted from this requirement, and possibly cases where it would be useless to exhaust such remedies.

The statute of the state of Wisconsin upon this subject is substantially the same as ours, and in the case of Cleveland v. Marine Bank, 17 Wis. 545, the law in the syllabus is stated as follows:

"Under section 25. ch. 148, R. S. (2 Tay. Sts., 1734), a creditor of a bank existing under the laws of this state may, without having obtained a judgment at law against it, maintain an action (in behalf of himself and all other creditors who may choose to become parties thereto) against the bank, jointly with its stockholders, to obtain the

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relief provided for by sections 21, 23, 24, 30, 31, and 32 of said chapter. Section 26 of the same chapter merely extends the remedy to such creditors as may choose to proceed to judgment against the corporation before resorting to the equitable proceeding provided by the statute."

Section 26 in the Wisconsin statute is similar to G. S. 1878, c. 76, § 16, and G. S. 1894, § 5904, of our state. It seems to us that this is a reasonable construction of the law. While an independent action may be commenced against a banking corporation under G. S. 1894, §§ 5900–5903, yet section 5904 is not in conflict with these sections, but is an extension of "the remedy to such creditors as may choose to proceed to judgment against the corporation before resorting to the equitable proceeding provided by the statute."

We perceive no inconsistency in these sections, and they may be applied to a different class of creditors, and still the workings of all be harmonious. Perhaps other sections of chapter 76, G. S. 1878, may be invoked to aid these creditors in enforcing the statutory liability of the stockholders of the defendant bank, but, upon the facts appearing in the record, we think the action may be commenced and maintained, under the sections which we have referred to as authorizing it, irrespective of the statement of counsel that it is brought under sections 17–23, c. 76. No proceeding hostile to the assignee in insolvency is sought, but the relief asked is that such assignee be also appointed receiver, in extension of the remedy already possessed by it against the stockholders, in behalf of such plaintiff creditors as may be equitably entitled to relief. A stockholder's liability is not a corporate asset, and it may be reached, through a proper proceeding, by a receiver of the corporation bringing in the stockholders of the corporation, which could not be done in mere insolvency proceedings.

The legislature has seen fit to authorize the commencement of an action against any insolvent corporation having banking powers, and the appointment of a receiver, to take charge of the property and effects of such corporation, and sue for and collect the same, and the wisdom of such an act is quite apparent. Referring, again, to G. S. 1894, § 5903, we find that, where application for an injunction and receiver is made by a creditor of any corporation whose directors or stockholders are liable by law for the payment of such debts, they

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may be made parties to the action when the complaint is filed, or at any subsequent stage of the proceedings, and their liability enforced. It seems to us that this provision is quite decisive of the question involved. It contemplates no prior judgment or return of an unsatisfied execution, but, either at the beginning, or at any stage of the proceedings, stockholders may be made parties. It certainly does not contemplate that, when a banking corporation shuts its doors, refuses to pay its depositors or creditors, and becomes hopelessly insolvent, they shall be compelled to wait for months or years, through a long, and perhaps expensive, litigation, for judgment, and execution returned nulla bona, before legal proceedings can be instituted to enforce a stockholder's liability. Perhaps a more strict adherence to the law and its imposed liabilities against corporations and their stockholders, directors, and officers may operate as a warning to those having them in charge that immediate pecuniary liability will usually follow inattention, negligence, or criminal disregard of their corporate duty towards those who, through confidence, have become their creditors.

The order overruling the demurrer is affirmed.

STATE OF MINNESOTA ex rel. ROBERT E. FISCHER v. DISTRICT COURT OF HENNEPIN COUNTY.[1]

June 16, 1896.

Nos. 10,169—(327).

Constructive Contempt—Evidence.

Held that, in cases of constructive contempt, if the affidavit or evidence presented to the court as a basis for proceedings in contempt does not state facts which, if true, would in law constitute a contempt of court, a conviction therefor cannot be sustained; also, that, in cases of strictly criminal contempts, the rules of evidence and the presumptions of law applied in criminal cases should be observed.

Same—Conviction Sustained.

Held, further, that the affidavit in this case was sufficient, and that the relator's conviction is sustained by the evidence.

[1] Reported in 67 N. W. 796.

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Certiorari to review a judgment of the district court for Hennepin county adjudging relator guilty of criminal contempt, entered after hearing before Elliott, J. Affirmed.

Merrick & Merrick, for relator.

PER CURIAM. The relator was convicted of a criminal contempt, not committed in the presence of the court, by the judgment of the district court of Hennepin county, and committed to jail for 60 days. The alleged act constituting the contempt was approaching and attempting to influence a juror in reference to his verdict in a cause then on trial. The case comes here on certiorari, and two errors are assigned:

1. That the affidavit which is the basis of the contempt proceedings is defective in substance, in that the facts stated, if true, do not constitute, in law, a contempt of court, for the reason that it is not directly charged therein that the relator knew that the person approached was a juror in the case. It is true, as claimed by relator, that, in cases of constructive contempts, an affidavit or other evidence must be presented to the court or officer of the facts constituting the alleged contempt, and if the facts, as presented to the court by affidavit or other evidence, do not, in law, constitute a contempt, a conviction therefor cannot be sustained. But the affidavit need not be in any particular form, or as certain and direct in its allegations of the ultimate facts constituting the contempt, as is required in an indictment. It is sufficient if the affidavit states only evidentiary facts, from which the ultimate facts constituting the contempt must necessarily be inferred. Such method of stating the facts constituting the contempt is not to be commended. Tested by the rule we have stated, we are of the opinion that the affidavit was sufficient. It appears, from the record, that the relator was represented by counsel on the hearing, and that no objections were made as to the sufficiency of the affidavit; and, after judgment, it will be held sufficient, unless it is so defective in its statement of facts as to be equivalent to the absence of an affidavit. Such is not this case; for, from the facts stated in the affidavit, it may fairly be inferred that the relator knew that the person approached was a juror, and that he was charged with attempting to improperly influence him.

2. The second alleged error is that the evidence is not sufficient

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to warrant relator's conviction, and that the court acted upon facts within its personal knowledge. In cases of strictly criminal contempts, the rules of evidence and the presumptions of law applied in criminal cases should be observed. Rapalje, Contempt, § 126. The evidence, tested by this rule, is sufficient to sustain the conviction of the relator. The admissions of the relator in his own testimony, and the facts and circumstances testified to by the juror, leave no reasonable doubt of the fact that the relator knew that the party approached was a juror, and that he attempted to improperly influence him in the giving of his verdict. The record does not show that the trial court found the relator guilty on facts not in evidence, but within its personal knowledge.

Judgment affirmed.

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PETER RESTAD v. HALFDAN ENGEMOEN.[1]

June 17, 1896.

Nos. 9458—(5).

Sale—When Executed.

In determining whether a sale is executed or executory, the rule is applied that, where anything remains to be done to the chattels for the purpose of ascertaining the price, as by weighing at a certain time in the future and feeding in the meantime, these things shall (in the absence of circumstances sufficiently indicating a contrary intention) be held to be a condition precedent to the vesting of title in the purchaser, though the particular chattels are ascertained.

Appeal by defendant from a judgment of the district court for Otter Tail county, in favor of plaintiff, for $82.59, entered after a trial before Baxter, J., and a jury. Reversed.

Peterson & Kolliner, for appellant.

J. T. McCulloch and *Charles C. Houpt*, for respondent.

CANTY, J. This action was brought to recover $38.41, the price of a cow and a steer which plaintiff alleges he sold to defendant.

[1] Reported in 67 N. W. 1146.

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Plaintiff had a verdict, and from the judgment entered thereon defendant appeals.

Plaintiff testified that about March 1, 1892, defendant came to his farm, looked at the cow and steer, and agreed to give him two cents per pound for the cow and 2.35 cents per pound for the steer, paid him one dollar on the cow and one dollar on the steer, and asked him to keep them, and feed them corn and potatoes, until April 26 following, and then to deliver them to defendant at Pelican Rapids, a town some distance from the farm; that plaintiff did so keep, feed, and deliver them, but that defendant refused to receive them. Thereupon plaintiff weighed them, and thereby ascertained the amount of the purchase price. Defendant testified that he told plaintiff that he would take the cattle at the price specified if plaintiff would "feed them up to beef." Said the witness: "I told him I could not handle cows at all unless they were fed to beef. * * * They were too poor. I could not take them because they were not fed to beef." Plaintiff testified that defendant merely told him to feed "them a little potatoes and corn, but don't give them too much any of the time," and denies that he agreed to fatten them. We are of the opinion that the evidence does not sustain the verdict and judgment.

In Martin v. Hurlbut, 9 Minn. 132 (142), the following extract is quoted with approval from Joyce v. Adams, 8 N. Y. 291:

"It is a general rule of law that, where a contract is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price. But, if anything remains to be done on the part of the seller, as between him and the buyer, such as weighing, measuring, or counting out of a common parcel, before the goods purchased are to be delivered, until that is done the right of property has not attached in the buyer."

See, also, Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471. In Benjamin, Sales (book 2) c. 3, § 318, one of Lord Blackburn's rules is stated as follows:

"First. Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, 'into a deliverable state,' the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

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In the present case there were altogether too many things to be done by the vendor to the chattels before delivery, and too few circumstances indicating an intention to vest title immediately, so that a finding that such intention existed cannot be sustained. Plaintiff's remedy was an action for damages for a breach of the executory contract.

Judgment reversed, and a new trial granted.

JOHN F. BAARS v. GEORGE HYLAND.[1]

June 17, 1896.

Nos. 9892—(107).

Real-Estate Broker—Finding a Purchaser.

Under a contract by the terms of which a real-estate broker was to receive a commission for his services if he found a purchaser, *held*, he has not found a purchaser within the meaning of the contract until he has produced such purchaser to his principal, the owner.

Same—Sale by Owner—Commission.

The broker did not have the exclusive right to sell. After he had found a purchaser ready and willing to buy on the owner's terms, but before he had notified the owner thereof, the owner found another purchaser, and closed a sale with him. *Held*, the owner was not liable to the broker for a commission.

Appeal by defendant from an order of the district court for St. Louis county, Charles L. Lewis, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $1,150. Reversed, and judgment ordered for defendant.

Manwaring & Sullivan and *Teare & Middlecoff*, for appellant.

Billson, Congdon & Dickinson, for respondent.

CANTY, J. Defendant was the owner of a quantity of standing pine timber in this state, which had been damaged by fire, and he was anxious to dispose of the same in time to have it cut the following winter, as it would become almost worthless if not cut. Under these circumstances he employed plaintiff, a broker doing busi-

[1] Reported in 67 N. W. 1148.

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ness at Duluth, to find a purchaser for the standing pine. This was about October 25, 1894. The terms of sale were changed, and the time extended several times, until it was finally limited to November 16 following. At 8 o'clock in the evening of that day plaintiff found a purchaser ready and willing to buy on defendant's terms, it being a lumber company, with whom plaintiff had been negotiating for some time prior. At 9:14 p. m. he telegraphed defendant at his place of residence at Danville, New York, by a night message, that he had found a purchaser. The message was delivered to defendant at Danville the next morning, November 17, at 9:15; but he had already on that morning, before he received the message, closed a sale of the timber to another party at the same price, and refused to deal with the purchaser plaintiff had found, or pay plaintiff a commission for finding him. Thereupon plaintiff brought this action to recover such commission, obtained a verdict, and from an order denying a new trial defendant appeals.

We are of the opinion that the verdict is not sustained by the evidence. It is admitted by plaintiff that he did not have the exclusive right to find a purchaser, and that by his contract he was to have no compensation unless he succeeded in finding a purchaser within the time limited. It is well settled that in such a case, and while the agent is engaged in trying to find a purchaser, the owner may sell the property if he can; and if he does so before the agent has found a purchaser he will not be liable to the agent for commissions, unless he has sold to a purchaser procured by the agent. Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345; Putnam v. How, 39 Minn. 363, 40 N. W. 258; Dole v. Sherwood, 41 Minn. 535, 43 N. W. 569.

The next question is: When, under such a contract, has the agent earned his commissions by finding a purchaser? Is it when the agent himself has found the purchaser, or when the principal has found him through the agent? Is it sufficient that the agent has himself found a person ready and willing to buy, or must he produce that person to his principal? Must he bring the parties together, so that the principal has also found the purchaser? We are clearly of the opinion that he must. He must at least put the principal in communication with the proposed purchaser. The principal must have an opportunity to make a binding contract with the proposed purchaser before the agent has earned his commission.

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In Francis v. Baker, 45 Minn. 83, 47 N. W. 452, it is said:[2] "Where a person agrees with a real-estate broker to pay him a commission if he procures a purchaser for his property on specified terms, the broker, in order to entitle him to his commission, is bound to present a purchaser who is ready, able, and willing to buy on the proposed terms." In Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15, it is said: "A real-estate broker is entitled to his commission under a contract like this when he produces a purchaser able, ready, and willing to buy on the owner's terms." In Putnam v. How, 39 Minn. 363, 40 N. W. 258, it is said: "It was necessary that plaintiff should make a sale of the farm, or at least procure and bring to defendant a purchaser ready and willing to buy on the terms offered." In Hayden v. Grillo, 35 Mo. App. 647, the broker had found a purchaser for cash, taken earnest money, and asked the owner to sign a receipt for it, but did not disclose the purchaser's name. The owner refused, thought the property had raised in price, and wanted time to consider. Nothing more was done by either the owner or broker until the latter sued the former for commission. It was held that the broker was not entitled to commission until he either had obtained a binding agreement from the proposed purchaser or had produced him to the owner, unless this was waived by the owner's refusal to complete the contract; and that, even where the sale was for cash, the broker must produce, not merely the earnest money, but also the purchaser, and, if he fails to do so, his principal may be justified (without defining his position) in suspecting that the agent is merely attempting to speculate on his principal's property, although the agent is in fact acting in good faith. In the case of Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105, the broker found a purchaser ready and willing to buy, took earnest money from him, and procured from the owner an abstract for him to examine, but never disclosed to the owner the name of the proposed purchaser until after the latter had examined the abstract and rejected the title because of a defect therein which rendered the title unmarketable. The court held: "The question here is, what is 'finding' or 'producing' a purchaser? * * * Is it sufficient for a broker to merely find a person financially able, and who verbally agrees with him to

[2] At page 84.

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purchase upon the terms of the vendor, and makes a deposit, but who neither signs a binding agreement to purchase upon such terms, nor is produced before the vendor as a person ready and willing to enter into such a contract? It seems to us very clear that this question must be answered in the negative. The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect; or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract." In the case of Darrow v. Harlow, 21 Wis. 302, the owner found one purchaser after the broker had found another, but before he notified the owner of the fact. The broker brought suit for his commission. The case is quite similar in principle to this, and there the court held the meaning of such a contract is that the broker is to have his commission "if he, within a reasonable time, before the defendant himself sold his farm, found a customer who would purchase it, and notified the defendant thereof." That the broker has not earned his commission until he has brought the buyer and seller together, see, also, Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, and Wylie v. Marine Nat. Bank, 61 N. Y. 415.

Then, conceding that this plaintiff had all of November 16 in which to find a purchaser, and a reasonable time thereafter in which to give defendant notice thereof, still his right to compensation was subject to the contingency that defendant might himself sell to some other purchaser before he received such notice from plaintiff, and, if that contingency happened, plaintiff's right to compensation was defeated. That contingency did happen, and we are therefore of the opinion that plaintiff cannot recover. It appears by the evidence that defendant could readily be found when wanted, and apparently acted in the best of faith with plaintiff. He had not suddenly gone away where he could not readily be found, and thereby delayed plaintiff in notifying him; and he did not find the other purchaser after the time when he would have been notified by plaintiff if the latter had not been so delayed. On the contrary, he was where plaintiff had expected to find him.

The order denying the motion of defendant for judgment in his favor, made with the motion for a new trial, is reversed, and judgment in the court below is ordered for defendant.

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MERCHANTS & MECHANICS SAVINGS BANK OF JANESVILLE v. W. D. CROSS and Others.[1]

June 17, 1896.

Nos. 9917—(75).

Negotiable Instrument—Indorsement—Bona Fide Purchaser—Expert Testimony.

The note in suit was indorsed without recourse, and transferred for value before maturity. The defendant makers, claiming that they had a defense to the note, offered to prove that at the time the indorsee purchased it one of the makers was insolvent, which such indorsee then knew, and to prove by expert evidence that it is not in the usual course of business to purchase a note under such circumstances. *Held*, such expert evidence was not competent.

Same—G. S. 1894, § 5751.

Rule applied that under section 5751, G. S. 1894, when the name and style of the payee ("Reid Bros.") is written on the back of a promissory note, the possession of the note is prima facie evidence that the signature is genuine.

Same—Bona Fide Purchaser—Offer of Evidence.

The plaintiff was permitted in the first instance to prove that it is an innocent purchaser for value before maturity of the note in suit. The defendant makers, without offering or intending to offer proof to rebut the same, merely offered to prove facts which would constitute a defense to the note in the hands of the original payee. *Held*, the trial court was justified in refusing the evidence so offered.

Appeal by defendants from an order of the district court for Wilkin county, Baxter, J., denying a motion for a new trial. Affirmed.

Ezra G. Valentine and *Lyman B. Everdell*, for appellants.

Mathews & Wood, for respondent.

CANTY, J. This is an action brought by the plaintiff bank as indorsee of the following promissory note, signed by all the defendants: "$800.00. Campbell, Minn., Mch. 27, 1890. On June 1st, 1892, after date, we promise to pay to Reid Bros., of Janesville, Wis., or order, eight hundred dollars, for value received, with interest payable annually at the rate of seven per cent. per annum from date until fully paid." Defendants, in their answer, admit the making of the

[1] Reported in 67 N. W. 1147.

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note, but allege that it was indorsed to plaintiff after maturity, and set up facts which would be a defense against the note in the hands of the original payee. The plaintiff had a verdict, and from an order denying a new trial defendants appeal.

On the trial plaintiff introduced the note and the indorsements thereon in evidence, and also the depositions of three witnesses, which, if not rebutted, show conclusively that plaintiff is an innocent purchaser for value before maturity in the usual course of business. Plaintiff then rested. Thereupon defendants called Hogoboom, one of the defendants, as a witness, and he testified that he formerly lived at Janesville, Wisconsin, the place of business of the plaintiff, and was acquainted with its officers. Thereupon the following proceedings took place: "Q. Mr. Hogoboom, what were your financial circumstances at the time you left Janesville, Wis., to come here? (Objected to. Objection sustained.) (1) Defendant proposes to prove by the evidence of this witness and of Howard Dykman, cashier of the First National Bank of Breckenridge, Minnesota, that it is not in the usual course of banking business to receive and discount paper of the makers whose financial responsibility is unknown, indorsed 'Without recourse.' (Same objection, ruling and exception.) (2) Defendant offers to prove that the indorsement of 'Reid Bros.' upon Ex. A is in the handwriting of Archie Reid, the witness whose deposition has just been read in evidence in this action. (Offer rejected by the court. Exception by defendant.) (3) Defendant offers to introduce evidence concerning the breach of warranty [set up in the answer], which offer was rejected by the court, and defendant excepted. Defendants then rested." The court then ordered a verdict for plaintiff.

1. As to the first offer of proof, it is only necessary to say that we are of the opinion that what transactions are and what are not in the usual course of business is ordinarily a question of law for the court or of fact for the jury, and not a question for expert evidence.

2. As to the second offer of proof it is only necessary to say that, the name of the payee, "Reid Bros.," appearing on the back of the note, the presumption is that it was signed by the payees, whoever they were. G. S. 1894, § 5751. Archie Reid, in his deposition, referred to in the offer, did not state whether he was a member of the firm of Reid Bros. or not. He simply stated that he attended to their

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financial affairs, and sold the note in question for a specified sum of money to the parties through whom plaintiff claims, and further than this he did not state that he had authority to indorse the name "Reid Bros." on the note. Defendants did not offer to show that Archie Reid was not a member of the firm of Reid Bros., and that he had no authority to indorse their name to the note. The offer did not go far enough, and was, therefore, immaterial.

3. As to the third offer, the evidence would have been competent if plaintiff had merely introduced in evidence the note with the indorsements thereon, and then rested. The defendants would then have been entitled to introduce in evidence their defense to the note, and that would have thrown on plaintiff the burden of showing that it was an innocent purchaser for value before maturity, in the usual course of business. But it assumed this burden in the first instance, and made so strong a showing that the defense interposed to the note would not have been available unless this showing was rebutted, which defendants did not offer to do, and it is to be inferred from their course of procedure that they did not intend to attempt to rebut it. Then the court was justified in refusing to receive evidence which, under the circumstances, would merely prolong the trial, and avail the defendants nothing.

The order appealed from is affirmed.

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JOSIAH WOLF and Others v. WILLIAM McKINLEY and Others.[1]

June 17, 1896.

Nos. 10,027—(166).

Lien—Dissolution by Assignment of Debtor.

Held, the lien on the property of the judgment debtor, acquired by the commencement of supplemental proceedings against him, was dissolved by the making by him, within 10 days thereafter, of an assignment for the benefit of his creditors, under the insolvency law, even though the complaint of the judgment creditor was on file for more than 20 days before the entry of judgment.

[1] Reported in 68 N. W. 2.

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Appeal by plaintiffs from an order of the district court for St. Louis county, Ensign, J., denying their motion for appointment of a receiver in proceedings supplementary to execution of the unexempt property of William McKinley, judgment debtor. Affirmed.

Wilson & Wray and *J. L. Washburn*, for appellants.

Billson, Congdon & Dickinson, for respondents.

CANTY, J. The complaint in this action was on file in the clerk's office more than 20 days after the action was commenced, and before the judgment against defendants for the recovery of money was entered. Thereafter an execution was issued, and returned unsatisfied. Thereupon an affidavit and order in supplemental proceedings were made, and served on the judgment debtor; and within three days thereafter, to wit, on February 15, 1894, he made an assignment for the benefit of his creditors, under the insolvency law of 1881.[2] The question involved in this case is whether the lien on his property acquired by the commencement of the supplemental proceedings was dissolved by such assignment. The trial court held that it was, and denied a motion made in the supplemental proceedings, on the disclosure of the judgment debtor, for the appointment of a receiver. From the order denying the same, plaintiffs appeal.

We, also, are of the opinion that the assignment dissolved the lien acquired by the supplemental proceedings. At the time in question, the first section of the insolvency law (G. S. 1894, § 4240) read as follows:

"Whenever any debtor shall have become insolvent, or garnishment shall have been made against any debtor, or property of any debtor shall have been levied upon by virtue of an attachment, execution, or legal process issued against him for collection of money, he may make an assignment of all his unexempt property; * * * and such assignment, if made within ten days after garnishment shall have been made against the assignor, or within ten days after property of such assignor shall have been levied upon by virtue of an attachment, execution, or other legal process against him for collection of money, as aforesaid, shall operate to vacate every garnishment and levy then pending: * * * provided, however, that such assignment shall not vacate or affect any levy made by virtue of an execution issued on a money judgment entered against such debtor on a complaint which was on file during at least twenty days next prior to entry of such

[2] Chapter 148.

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judgment in the court in the county where the defendant resided meanwhile." (This last proviso was stricken out by Laws 1895, c. 66.)

We are of the opinion that, within the meaning of this section, "legal process issued against him for collection of money" includes the statutory process of supplemental proceedings; and the institution of such proceedings to reach the concealed property of the judgment debtor is a levy of that process, within the meaning of that section. "Process" does not necessarily mean "writ" or "summons," but is often used in the sense of "proceedings." Hanna v. Russell, 12 Minn. 43 (80).

Appellants contend that the doctrine of ejusdem generis should be applied to the terms "legal process" and "other legal process," as they occur in connection with the terms "attachment" and "execution," and that they refer only to other like writs. In answer to this, we will say that to give the terms in question this narrow meaning would be contrary to the spirit and intent of the whole insolvency law, when all of its parts are construed together. In such a case the principle of ejusdem generis, contended for, does not control. See Sutherland, St. Const. § 279. If appellants' contention is right that said term "other legal process" does not include supplemental proceedings and the lien acquired thereby, then it is immaterial whether the plaintiffs' complaint was on file 20 days next prior to the entry of judgment or not; the lien acquired by the supplemental proceedings would not be dissolved in any event. The plaintiffs could file their complaint, enter judgment, issue execution, have it returned unsatisfied, and commence supplemental proceedings, all on the same day. The judgment debtor could make an assignment on the next day, but it would not dissolve the lien acquired by the supplemental proceedings. Such a construction would totally subvert the insolvency law and the intention of the legislature in passing it.

Then we are of the opinion that supplemental proceedings are included in the term "other legal process against him for collection of money, as aforesaid," and that the lien acquired by the proceedings was dissolved, unless it was saved by the proviso aforesaid, added to section 4240. In order to bring the lien of these proceedings within that proviso, we must hold that such lien and proceedings come within the term "levy made by virtue of an execution," or else we must hold it to be a case where equity follows the law. It is plain

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that the term "levy made by virtue of an execution" does not include such lien and proceedings. Again, such lien is not expressly provided for in the statute giving the remedy of supplemental proceedings;[3] and, conceding that it is but an equitable lien, still we are of the opinion that it is not so analogous to the lien acquired by the levy of an execution that the analogy of the latter should be adopted so as to hold that the lien here in question comes within such proviso. The lien acquired by the levy of an execution is on specific known property. The lien acquired by commencing supplemental proceedings is a sort of drag-net, which gathers in assets, legal and equitable, known and unknown. Then we cannot hold that such a lien as the latter was saved by the proviso.

The order appealed from is affirmed.

CLARENCE S. NIXON v. GARDINER H. REEVES.[4]

June 19, 1896.

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Nos. 9392—(11).

False Imprisonment—Complaint.

A complaint which alleges that, at a time and place stated, the defendant imprisoned the plaintiff without probable cause, states a cause of action.

Militia Officer—Authority to Imprison.

A captain of a company of the National Guard of this state, when it is not acting as a military force, is not authorized to punish summarily by imprisonment a member of his company for a refusal to obey his orders.

Appeal by defendant from an order of the district court for St. Louis county, Moer, J., denying a motion for a new trial. Affirmed.

Chester McKusick, for appellant.

O. W. Baldwin, for respondent.

START, C. J. Action to recover from the defendant damages for the false imprisonment of the plaintiff. Verdict for the plaintiff for $15. The defendant appeals from an order denying his motion for a new trial.

[3] G. S. 1894, §§ 5486–5496.

[4] Reported in 67 N. W. 989.

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The record presents two questions for our decision: First. Does the complaint state a cause of action? Second. Has a captain of a military company organized pursuant to the Military Code of this state authority to punish summarily by imprisonment an enlisted man, when not in active service, for refusing to obey his orders?

1. The complaint is in these words: "Plaintiff alleges that on the 18th day of May, 1894, at the city of Duluth, St. Louis county, Minn., the defendant imprisoned him for two hours and forty-five minutes without probable cause; that said act was done willfully and maliciously, with the intent to humiliate and disgrace this plaintiff in the presence of his comrades and in the opinion of his associates; that plaintiff was damaged, by reason of the premises, in the sum of one thousand dollars." The objection made to this complaint by the defendant is that it does not allege any facts showing the manner of the imprisonment, and that it was unlawful,—an essential element in a charge of false imprisonment. If the complaint is defective in this respect, it is cured by the answer, which practically admits the imprisonment, and sets out the cause and manner of the imprisonment in justification. Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879; Lesher v. Getman, 30 Minn. 321, 15 N. W. 309. But the complaint states a cause of action. 1 Estes, Pl. & Prac. 561. The allegation that the defendant, on and at the time and place stated, imprisoned the plaintiff, without probable cause, for two hours and forty-five minutes, is not a conclusion of law, but a composite statement of ultimate facts, viz. the imprisonment of the plaintiff, and that it was without probable cause. If the imprisonment was without probable cause, it could not have been either lawful or justifiable.

2. The second question is answered in the negative.

"It shall be the duty of the legislature to pass such laws for the organization, discipline and service of the militia of the state as may be deemed necessary." Const. art. 12. The legislature, pursuant to this provision, enacted a Military Code. G. S. 1894, c. 12, §§ 1714–1758. Each company is authorized by this Code to adopt a constitution and by-laws not in conflict with the Code. Id. 1751. Provisions are also made for trial of officers and enlisted men by courts-martial. Id. § 1757. The Code (section 1754) also expressly provides for the trial and punishment of members of the company who are

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guilty of disobeying the orders of their superior officers, or of any other breach of discipline, in these words:

"In case any member of such regiment, battalion, company, or battery shall have incurred any of the fines or penalties prescribed in its said constitution and by-laws, by reason of his failure or neglect to perform his duty as a member of said regiment, battalion, company, or battery, or by disobedience of orders, or by acts of insubordination, or conduct prejudicial to military discipline, such failure or neglect is hereby declared to be a misdemeanor, and the commandant, or other proper officer of such regiment, battalion, company, or battery, shall make complaint against such member before any justice of the peace or any court of competent jurisdiction within the county in which such member of such regiment, battalion, company or battery may reside. Said justice or court shall thereupon proceed to hear and determine said complaint and matter in the same manner as in the trial and hearing of cases of misdemeanor under the laws of this state. Such member shall, upon conviction of such misdemeanor, be punished by a fine not exceeding ten dollars, together with the costs of such proceeding, and shall be committed to the county jail of said county until said fine and costs are paid, for a period not to exceed ten days. Said complaint shall be made and proceedings taken thereunder in the name of the state of Minnesota, but without cost to said state; and all fines paid thereunder shall be paid into the treasury of such regiment, battalion, company, or battery, as the case may be, for the benefit of its military fund."

These provisions cannot be held to be simply cumulative, as claimed by the defendant. The legislature having, in obedience to the constitution, expressly provided for the discipline of the militia, and prescribed the punishment for a disobedience of orders, and made it the duty of the commanding officer to institute criminal prosecutions for such offense, the punishment fixed by the statute is exclusive; and such officer cannot take the law into his hands, and summarily punish the offender, by imprisonment or otherwise, at his pleasure.

We are not to be understood as holding that where the state National Guard is acting as a military force—for example, in suppressing a riot—the commanding officer may not enforce instant and absolute obedience to his orders by the use of such reasonable force as may be necessary. The statute under consideration must be given a reasonable construction, and it is not to be construed as applicable to the militia when in actual military service. The fact that the

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statute requires that the prosecution must be instituted in the county where the offending member resides supports this construction.

In this case the plaintiff was a member of Company G, Third regiment of infantry of the National Guard of the state of Minnesota, and the defendant was captain of the company. At the time stated in the complaint the defendant, as such captain, ordered the plaintiff, who was present at the drill room of the company for another purpose, and without his uniform on, to take part in a special drill. He refused. Thereupon the defendant placed him under arrest, and imprisoned him, as alleged in the complaint. It is apparent from the record that the defendant did not arrest and detain the plaintiff for the purpose of taking him before a justice of the peace, at the first reasonable opportunity, to answer to the charge of disobeying the orders of his superior officer. On the contrary, he seems to have acted upon the mistaken theory that he was authorized to punish a disobedience of his orders summarily, and at his discretion. In this he was mistaken. He should have proceeded against the plaintiff before a court-martial or a justice of the peace, or both. It is urged that this construction of the statute is destructive of military discipline. Of this it is not our province to judge, but if such be the case the remedy is with the legislature.

Order affirmed.

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FIRST NATIONAL BANK OF SHAKOPEE v. H. BURTON STRAIT, Administrator.[1]

June 19, 1896.

Nos. 9871, 9948—(93, 94).

Dissolution of Firm—Declarations of Partner.

After the dissolution of a partnership, the acts or admissions of one partner are not admissible in evidence against his former co-partners, unless assented to or authorized by them.

Same—Admission of Evidence.

Rule applied, and *held*, that the trial court erred in admitting evidence of the acts and admissions of one partner, done and made after a dissolution

[1] Reported in 67 N. W. 987.

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of the firm, for the purpose of establishing a charge of fraud made by the plaintiff against the former co-partner.

Action in the district court for Scott county. The jury rendered a verdict in favor of plaintiff for $7,368. Defendant made a motion for a new trial on the ground that the verdict was not justified by the evidence and for errors of law, and afterwards made a second motion for a new trial on the ground of misconduct of the prevailing party, accident or surprise, and newly-discovered evidence. From orders, Cadwell, J., respectively denying said motions, defendant appealed. First order reversed. Second order affirmed.

W. C. Odell, *Southworth & Coller*, *and Warner*, *Richardson & Lawrence*, for appellant.

Chas. G. Hinds and *Henry Hinds*, for respondent.

START, C. J. On October 13, 1885, Horace B. Strait, the defendant's intestate, David L. How, George F. Strait, and Robert Lusk were partners in the flour-milling business, under the firm name of George F. Strait & Co., at Shakopee, in this state. They had been such partners for more than five years prior to that date. George F. Strait died May 30, 1887; Robert Lusk, on March 28, 1893; David L. How, on December 22, 1893; and Horace B. Strait, on February 25, 1894. All of the parties died intestate and insolvent, except Horace B. Strait, who died intestate and solvent; and the defendant, H. Burton Strait, is the administrator of his estate. Horace B. Strait and David L. How were on October 1, 1883, and thereafter, as long as they respectively lived, directors of the plaintiff bank; the former being its president from that date to January 1, 1892, and the latter its cashier until the day of his death.

On and prior to October 13, 1885, the plaintiff held and owned a promissory note made by George F. Strait & Co. for the sum of $10,000, and on that day a note for the same amount, due January 1, 1886, was given in its place, signed by George F. Strait & Co. Five days thereafter, and on October 18, 1885, the flour mill of the firm was destroyed by fire. Before the maturity of this renewal note, it was stamped on its face with the words: "First National Bank. Paid Nov. 28, 1885." But it has remained ever since in the possession of the bank. Interest has been paid and indorsed upon it to January 1, 1887. This is the last indorsement on the note prior to the death

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of George F. Strait. October 27, 1887, there was paid on the principal $5,000. The interest is indorsed as paid to July, 1890, on the note, in the handwriting of How.

The plaintiff claims that How and Horace B. Strait concealed from its board of directors, and from it, the fact that the original note was renewed, instead of being paid; that they falsely stamped the renewal as paid, and fraudulently concealed from the bank the fact that the note had not been paid, and that each of them, knowing that their own debt to the plaintiff had not been paid, failed to notify the plaintiff of its nonpayment; that it did not discover the facts constituting such alleged fraud until the year 1894. By this action it seeks to recover against the estate of Horace B. Strait, on account of such alleged fraud, an amount equal to the balance due on the note. The defense is: (1) Payment; (2) the statute of limitations. The plaintiff had a verdict, and the defendant made a motion for a new trial on the ground that the verdict was not justified by the evidence, and for errors of law. This motion was denied. Subsequently the defendant made a second motion for a new trial on the ground of newly-discovered evidence. This motion was also denied, and the defendant appeals from each of the orders.

The assignments of errors raise three general questions: (1) Did the trial court err in the admission of evidence? (2) Did it err in its instructions to the jury? (3) Is the verdict justified by the evidence?

The assignments of error as to the rulings of the trial court on the admission of evidence are numerous,—some 70 in all,—but we are of the opinion that no substantial or prejudicial error was committed in receiving evidence of the acts and admissions of How, and of the papers and records of the bank relating to the note in question, which were made or done prior to the dissolution of the firm of George F. Strait & Co., on May 30, 1887, by the death of George F. Strait. The burden was on the plaintiff to establish its allegations of fraud. Where fraud is the issue, great latitude in the admission of evidence is permissible, for it is seldom that it can be established by direct evidence. In proving its case, the plaintiff, of necessity, was obliged to resort to indirect and negative evidence, in order to prove that the note had not been paid, and that its nonpayment had been concealed from the bank. Therefore evidence of the customary course of business of

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the bank, as to entries in its books and records when a note was received and when it was paid, in connection with evidence of the existence or absence of such entries as to this particular note, was competent and material. The inventories made by the bank were competent and material evidence, for they tended to characterize the possession of the note by the bank after it had been stamped "Paid," and to show that the bank did not hold it as bailee of a canceled note, but as an asset of the bank.

But the evidence of the acts and admissions of How after the partnership was dissolved by the death of George F. Strait, which was received over the objection and exception of the defendant, was incompetent; and its reception was prejudicial error, for which a new trial of this case must be granted.

The destruction of the flour mill of George F. Strait & Co. did not per se, as claimed by the defendant, dissolve the firm. It was not organized to operate this particular mill, but it was dissolved by George F. Strait's death, May 30, 1887. It may be conceded that each partner is liable for the fraud of any member of the partnership with reference to the business or affairs of the partnership. It does not, however, follow from this that after the dissolution of the partnership the acts and admissions of one of the partners are admissible against his former co-partners. Whatever may be the rule in other jurisdictions, it is the settled law of this state that after the dissolution of a partnership the acts or admissions of one partner are not admissible against his former co-partners, unless assented to or authorized by them. Whitney v. Reese, 11 Minn. 87 (138); National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043.

The trial court received evidence, material portions of which were admitted against the defendant's objections and exceptions, tending to show that How, after the dissolution of the firm, and in April, 1893, wrote into plaintiff's register of bills receivable two entries indicating that the bank held a note against O. C. Hartman for $1,500, dated October 20, 1893, and one against M. K. Armstrong for $3,000, dated April 4, 1893; that in October, 1893, How made out, and placed in a pocketbook where the bills receivable of the bank were kept, two memoranda (plaintiff's Exhibits 2 and 3) indicating that the supposed Hartman and Armstrong notes had been sent to Duluth and St. James, respectively, for collection; that the bank

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never in fact had any such notes; and that Exhibits 2 and 3 were mere dummies. The assistant cashier made a memorandum of these dummies (plaintiff's Exhibit 6), and showed it to How a day or two before the latter's death, on December 28, 1893, who then wrote on the memorandum to the effect that Exhibits 2 and 3 were carried as a part of the George F. Strait & Co. loan. These exhibits, and also How's written explanation, were received in evidence, the defendant objecting and excepting thereto. The assistant cashier testified that he is pretty certain he showed Exhibits 2 and 3 to Horace B. Strait a day or two before he showed them to How, but he also testified that he never exhibited the memorandum to Strait after How's explanation had been written thereon, and we find no evidence in the record which would justify the conclusion that Strait knew Exhibits 2 and 3 were fictitious.

This evidence of the acts and admissions of How after the dissolution of the firm was of the most prejudicial character, and was clearly incompetent as against the defendant. It was simply the written admission of How, wholly disconnected with any act, that the dummies previously fabricated by him related to the note in question in this case. It is unnecessary to discuss this evidence, or comment on the conduct of How. The charge made by the plaintiff against defendant's intestate was a serious one, for it involved the honor and estate of a dead man. All of the makers of the note in question were dead before the claim was made. In view of these circumstances, the rules of evidence must be adhered to with reasonable strictness.

The plaintiff seeks to justify the admission of the evidence to which we have referred on the ground that it related to the time, manner, and circumstances of the discovery of the fraud. The argument made by plaintiff's counsel in support of this claim is able, but specious. While it was necessary for the plaintiff to show that its action was brought within six years next after the discovery of the alleged fraud, yet it could not, under this mask, introduce evidence manifestly incompetent and prejudicial. This evidence would have been competent on the issue of fraud, if the action had been against How's estate, instead of Strait's; but, as against the latter, it was not competent on that issue. When the written admission of How, made two days before his death, to the effect that Exhibits 2 and 3

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were carried as a part of the George F. Strait & Co. loan, was offered in evidence, and was objected to by defendant, counsel for the plaintiff, in response to the inquiry of the court as to the purpose of the evidence, replied, "Simply as one of the modes adopted for concealing the frauds that had previously been committed, and that being simply an explanation that it was for that purpose." That is, it was simply one of How's modes, adopted years after the dissolution of the partnership, to conceal the fraud he had committed and his admission that his act in question was for that purpose. It is apparent from this that the real object and purpose for which this evidence was offered and received were not to fix the time when the bank first discovered the alleged fraud, but to charge the fraud upon Strait by the acts and admissions of How.

It is also claimed that this evidence was admissible on the ground that How was the decedent's agent for the settlement of the partnership affairs. The claim is not regardable, for, while the business of settling up the business of the partnership was left with How, his acts and admissions received in evidence were not connected with any settlement of the affairs of the firm, or within the scope of his agency express or implied.

Inasmuch as there must be a new trial for error in the admission of evidence, we deem it unnecessary to discuss the remaining questions raised by the defendant on this appeal. It would serve no practical purpose to do so, as the evidence on the next trial may not be identical with that given on the first trial.

With reference to another trial, we deem it proper to say that we are of the opinion that the district court obtained jurisdiction of the parties and the subject-matter of this action by appeal from the probate court, and by the defendant answering the complaint and going to trial without objection, even if it be true, as claimed by the defendant, that the plaintiff's demand is founded in tort, and therefore could not have been allowed by the probate court.

The defendant's second motion for a new trial, on the ground of newly-discovered evidence, was properly denied, and the order denying it is affirmed. The order denying defendant's first motion for a new trial is reversed, and a new trial granted.

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ALBERT E. ENGESETHER v. GREAT NORTHERN RAILWAY COMPANY.[1]

June 19, 1896.

Nos. 9872—(149).

Live Stock—Connecting Carrier—Notice of Claim of Damages.

Defendant contracted with plaintiff to transport live stock to a point beyond the line of its road, it having to deliver it to another and connecting road for transportation to its destination. The contract contained a provision that, as a condition precedent to his right to recover any damage for any loss or injury to said stock, plaintiff should give notice in writing of his claim therefor to some officer of the defendant company, or its nearest station agent, before the stock is removed from the place of its destination or delivery, and before it is mingled with other stock. It did not appear that the defendant had any officer or agent at the place of destination or delivery. *Held* that, under the circumstances, this condition was unreasonable and void.

Appeal by defendant from an order of the district court for Polk county, Ives, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $130. Affirmed.

C. Wellington, *A. C. Wilkinson* and *W. R. Begg*, for appellant.

H. Steenerson, for respondent.

MITCHELL, J. Plaintiff's several causes of action all fall under two general heads: First, the failure of defendant on two occasions to furnish him, at the times agreed, cars in which to ship cattle from McIntosh to South St. Paul; second, unreasonable and negligent delay, on both occasions, in the transportation of the cattle after they were shipped. The defendant, by its answer, denied all the allegations of the complaint except the receipt of the cattle from plaintiff for shipment as alleged, and, as a further defense, set up the provisions of the written contract (Exhibit A) under which the cattle were shipped, as releasing or exempting it from all liability on account of the matters alleged in the complaint. Irrespective of the provisions of this contract, the evidence upon both classes of causes of action made a case for the jury.

[1] Reported in 68 N. W. 4.

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The only exceptions taken by defendant upon which it can question the sufficiency of the evidence to support the verdict are to the refusals of the court to dismiss the action when plaintiff rested, and to direct a verdict for the defendant when the evidence closed. Hence, if there was evidence upon which the jury might have found for the plaintiff in any sum upon any of his causes of action, the refusals of the court were correct. Inasmuch as there was ample evidence that the delay in the transportation of, at least, one of the shipments of cattle was caused by the negligence of the defendant, and inasmuch as the stipulation in the contract attempting to limit the liability of the defendant in such cases to the willful negligence of its agents was void, as being against public policy, it follows that the jury would have been justified in finding a verdict for plaintiff in some amount, unless the defendant was relieved of all liability by reason of the failure of the plaintiff to comply with the following provision of the contract:

"For the consideration before mentioned [defendant's carrying the cattle in car loads at tariff rate per car load], said party of the second part [plaintiff] further agrees that, as a condition precedent to his right to recover any damage for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part [defendant], or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to the said party of the second part, and before such stock is mingled with other stock."

Hence the reasonableness and validity of this condition as applied to the facts is the only question in the case.

We do not find it necessary to consider whether stipulations on part of the carrier for notice of loss within a specified time may not, under certain circumstances, be reasonable and valid, if not forbidden by statute, or the further question whether such stipulations constitute such a limitation of the carrier's liability as is forbidden by G. S. 1894, § 381. In the present case the freight was live stock being shipped to the market, and which had to be speedily disposed of after it reached its destination, and was liable to deteriorate in flesh and weight by remaining in the stock yards, to say nothing of the expense of feeding. The place of delivery was beyond the line of defendant's road, and it does not appear that it had any agent or officer there, and there is no presumption that it had any. It appears from

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the evidence that, while defendant's contract with plaintiff was to transport the cattle through to South St. Paul, yet it did not own or operate a road to that place; but, when the cattle arrived at Como station, it delivered them over to another road, which carried them to their destination. Aside from the very indefinite and uncertain terms of this provision, we think that to require plaintiff, under the circumstances, as a condition of his right to recover damages, to keep his stock until he could prepare a written notice, and then go or send and hunt up an officer of the defendant company upon whom to serve it, was unreasonable and void. In this case it is true that it was only 10 miles from the point where defendant turned over the stock to the other road, to the place of its destination; but the principle is the same as if it had been 50 or 100 miles. See Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Smitha v. Louisville & N. R. Co., 86 Tenn. 198, 6 S. W. 209.

Order affirmed.

WILLIAM A. LYNCH, Receiver, v. CHARLES CURFMAN.[1]

June 19, 1896.

Nos. 9876—(192).

Sale—Breach of Warranty.

The submission by the court to the jury of the question whether the vendor warranted the quality of a chattel, and the instructions of the court as to the effect of a breach of the warranty, if one existed, *held* to have been erroneous.

Same—Effect.

The breach of a warranty neither rescinds the sale nor gives the vendee a right to rescind, but merely a right of action for damages.

Same—Vendor's Expressions of Opinion.

Where the vendor makes statements as to the quality of the article, but accompanied by an express and positive refusal to warrant it, and a like notice to the vendee that he will not and does not warrant it, his statements as to quality must be deemed mere expressions of opinion, and not a contract of warranty, at least in the absence of any fraud or deceit, and where the property is present for the inspection of the vendee.

[1] Reported in 68 N. W. 5.

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Same—Parol Evidence to Vary Written Contract.

The admission of certain oral evidence *held* not to have been in conflict with the rule that the terms of a written contract cannot be contradicted or varied by contemporaneous oral evidence, the oral contract being upon an entirely different subject from that covered by the written one, although both contracts were parts of the same transaction.

Appeal by plaintiff from a judgment of the district court for Clay county, in favor of defendant, after a trial before Searle, J., and a jury. Reversed.

George E. Perley and *Newman, Spalding & Phelps*, for appellant.

C. A. Nye, for respondent.

MITCHELL, J. The intervenor bought from plaintiff a second-hand threshing machine, for the purchase price of which he gave his note for $150, and as security for its payment assigned to plaintiff a note for $200, secured by chattel mortgage on a span of horses and dray, executed to him by the defendant, Charles Curfman. As this machine failed to do good work, the intervenor shortly afterwards bought of plaintiff a new machine, the regular price of which was $510. The order and contract of purchase of the new machine is Exhibit A in the paper book. On the delivery of the machine the intervenor executed to plaintiff notes for $35, $87.50, and $237.50, as provided for in the contract. This new machine not fulfilling the warranty, it was subsequently agreed by the parties that the sale should be rescinded, the machine returned by the intervenor, and the notes which plaintiff held for its purchase money returned. The intervenor returned the machine, and some time afterwards the plaintiff surrendered to him the notes for $35, $87.50, and $237.50, but not the note for $150, originally given for the old machine, or the collateral note and chattel mortgage for $200 against the defendant. So far the parties agree as to the facts. The next year plaintiff brought this action against the defendant to recover possession of the property covered by the chattel mortgage.

The intervenor became a party to the suit, and, in addition to these facts, alleged that when he purchased the old machine plaintiff agreed with him that it would do good work, and was in good repair; and that, if it failed to do good work, or was found to be in any manner defective, plaintiff would make it in all respects to conform to

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its representations and agreements; that the machine was not in good repair, and would not do good work, and was utterly worthless as a thresher; that he notified plaintiff of these defects, and requested it to remedy them; that after several ineffectual attempts on part of plaintiff to do so, a new contract was made by the parties, by which the sale of the old machine was entirely rescinded, and a new machine, in place of it, sold and delivered by plaintiff to the intervenor, for the consideration of the note for $150 given for the old machine (which was to stand as a payment on the new machine), and of additional notes of the intervenor for $35, $87.50, and $237.50, respectively; that, as this new machine failed to fulfill the warranty with which it was sold, it was subsequently agreed between intervenor and plaintiff that this sale should also be, and was, rescinded; that the intervenor returned the machine, and demanded back all his notes and securities; that plaintiff afterwards returned him three of the notes, but not the $150 note, or the collateral note and mortgage for $200, although the agreement at the time the sale was rescinded was that they should all be returned to him. Intervenor's demand for judgment was for the return to the defendant of the property described in the complaint or its alternative value, and for his costs and disbursements, and for such further relief as to the court should seem just.

It will be seen from this that, while the intervenor alleges certain representations and agreements on part of the plaintiff in the nature of a warranty of the quality of the old machine, he neither alleges nor claims any damages on account of their breach; but simply alleges them by way of inducement and consideration for the new contract when the new machine was purchased. His defense was that by this new contract the former one for the sale and purchase of the old machine was entirely rescinded and wiped out as fully as if never made, and the note for $150 thereafter stood as a partial payment on the purchase price of the new machine; and hence, by virtue of the subsequent arrangement by which it was agreed that the sale of the new machine was also to be set aside, he was entitled to a return of the $150 note and collateral mortgage, as well as his other notes. On the other hand, the claim of the plaintiff, both in its answer and its proof, was that it was no part of the agreement, when the new machine was sold, that the sale of the old machine was to

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be rescinded, but, on the contrary, that that sale was to remain unaffected; that the intervenor was still to remain liable on the $150 note as the price of the old machine, and not as part of the purchase price of the new machine, and that the three notes for the aggregate sum of $360 represented the whole of the purchase price of the latter; and hence, when the sale of the new machine was rescinded, the intervenor was not entitled to the return of the $150, or of the chattel mortgage assigned as security for its payment. Therefore, so far, at least, as the pleadings go, the only material issue between the parties was as to the terms of the contract made between them when the new machine was purchased; and upon that issue it was wholly immaterial whether the old machine was sold with or without a warranty.

Upon the trial some evidence was introduced by intervenor tending to show that plaintiff's agent made certain statements as to the quality of the old machine which, standing by themselves, might have constituted a warranty, but, as we read the record, the uncontradicted evidence is that these statements were accompanied by an express and positive notice and declaration to the intervenor by the agent that he did not and would not warrant the machine. It was present, and subject to the inspection of the intervenor, and there was no claim that any fraud or deceit was practiced by the agent. And there is nothing in the record to indicate that the intervenor offered this evidence of the so-called "warranty" for any other purpose than that for which he pleaded it, viz. as tending to show an inducement and consideration for the subsequent new agreement; for he offered no evidence of damages resulting from a breach of the alleged warranty.

Upon this state of the pleadings and evidence the trial court instructed the jury, in substance, that the first and the vital and important question in the case was whether there was a warranty of the old machine; that they should take up that question first; and that, if they found that there was such a warranty, and a breach of it, that would be an end of the case, and would constitute a defense to this action, and that plaintiff could not recover. This instruction, which was excepted to, and is here assigned as error, was clearly erroneous, for three reasons. There was no such issue in the case. There was no evidence of a warranty to submit to the jury. War-

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ranties are contracts, and the rules for interpreting them or determining whether they were made do not differ from the rules applied in the case of any other contracts. At least, in the absence of fraud or deceit, where a vendor makes statements as to the quality of the article sold, accompanied, however, by a positive and express refusal to covenant it, or a like statement and notice to the vendee that he does not and will not warrant it, his statements as to the quality of the article must be deemed mere expressions of opinion and not a contract of warranty. And, lastly, the breach of a warranty does not rescind a sale or give the vendee a right to rescind, but merely a right of action for damages. In this case, even if a warranty and a breach of it had been shown, there was no evidence of damages.

This erroneous instruction was clearly prejudicial, unless the evidence on the real issue in the case was so conclusive as to require a verdict in favor of the defendant and intervenor. In view of the admitted facts, it seems to us that intervenor's version of the terms of the contract at the time the new machine was purchased was so reasonable and probable that it might be rightly claimed that the preponderance of evidence was on his side; but, in view of the rebutting evidence on part of the plaintiff, the question was one for the jury; and under the instructions of the court they may never have reached that question.

With a view to another trial, there are one or two other questions raised by the briefs which should be noticed.

It was competent for the intervenor to prove by oral evidence that at the time of the purchase of the new machine it was also, and as part of the same transaction, agreed that the sale of the old machine should be rescinded and set aside, and that the $150 note given therefor should be retained by the plaintiff as a partial payment on the purchase price of the new machine. The admission of such evidence would not violate the rule that a written contract cannot be contradicted or varied by contemporaneous oral evidence. The written contract (Exhibit A) does not refer to the matter of the sale of the old machine, and the evidence as to the rescission of that sale falls within the familiar rule that parol evidence is admissible to prove an oral agreement relating to a different subject-matter from that covered by the written contract, although both contracts may be parts of the same transaction. Nor does evidence that, as part of

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this rescission, it was agreed that the $150 note was to stand as a part payment on the price of the new machine, in any way contradict or vary the terms of the written contract. Such an agreement is entirely consistent with the provision that on the delivery of the new machine intervenor was to pay, or give his notes for, $360. Moreover, the written contract contains an express promise to pay the $150 note, but the writing is indefinite and ambiguous as to what was the consideration for that promise,—whether it was the original consideration for which it was given, to wit, the old machine, or a new consideration, to wit, the new machine.

Evidence of the rental value or value of the use of the property while detained during the pendency of the action was admissible under the answer of the original defendant, who, if any one, was entitled to damages for such detention. It is proper in this connection to call attention to the wild estimates of damages often indulged in by juries and witnesses in cases of this and similar classes. The property in this case consisted of a dray and a span of horses, without driver, feed, or harness, confessedly all worth only $250. There was no claim for special damages, and no evidence of a deterioration of the value of the property by either its use or abuse; and yet the intervenor and some of his witnesses testified that the value of the use of this property for the two years and a half during the pendency of the action was $2 a day, which would amount to over $1,800. It may be true that neither courts nor juries can take judicial notice of the value of the use of property, but there must be some limit even to judicial credulity and ignorance on such subjects; and every judge and juror knows—and is bound to act on his knowledge—that any such estimate as above of the value of the use of this property was simply absurd. The jury were much more modest than the witnesses in their estimate, for they awarded the defendant only $264 damages, which, however, was still equal to interest on the value of the property at the rate of over 48 per cent. per annum. In view of the frequency with which we are confronted with what seems to us excessive verdicts for damages in cases involving the unlawful detention of personal property, the breach of warranty on the sale of chattels and the like, we deem it not improper to suggest to the learned trial judges of the state that juries should always be carefully and clearly instructed in such cases as to the rules that should

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govern them in arriving at the proper measure of damages. This suggestion is not made with any special reference to the present case, for the jury was moderate in their assessment of damages as compared with many cases which have come to our notice.

Order reversed.

JAMES FARMER v. CITY OF ST. PAUL and Others.[1]

65 176
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June 19, 1896.

Nos. 9914—(195).

City of St. Paul—Ordinance Making House of the Good Shepherd a Workhouse—Illegality.

The only workhouses the city of St. Paul is authorized by its charter to establish and maintain for the imprisonment at hard labor therein of persons convicted of offenses subjecting them to imprisonment, under the charter and ordinances of the city, are such as are subject to the management and control of municipal authority, and whose superintendents or managers are public officers or agents. *Held*, accordingly, that an ordinance of the city establishing the House of the Good Shepherd as a workhouse for female prisoners is void, and that all contracts by the city with the corporation owning and controlling such house for the detention and board of prisoners therein are illegal, and the city may be enjoined from entering into such contracts, at the suit of a resident taxpayer.

Same—Complaint.

Held, further, that the complaint herein does not show the plaintiff entitled to an injunction restraining the city from paying such institution for its past services in boarding and caring for such prisoners, or to an accounting for money paid by the city in the past for similar services.

Appeal by plaintiff from an order of the district court for Ramsey county, Egan, J., denying a motion to set aside an order for judgment on the pleadings in favor of defendant theretofore made, and denying a motion for a new trial. Reversed.

Butts & Jaques, for appellant.

E. J. Darragh and *Robertson Howard*, for respondent city and J. J. McCardy, Comptroller of said city.

[1] Reported in 67 N. W. 990.

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C. D. & T. D. O'Brien and *Stevens, O'Brien, Cole & Albrecht*, for respondent House of the Good Shepherd.

START, C. J. This is an action by a taxpayer of the city of St. Paul to enjoin the city from paying the defendant the House of the Good Shepherd the sum of $71.50 for the board of female prisoners committed to such house by the municipal court of the city, pursuant to an ordinance of the city; also, to enjoin the city from allowing or paying any money from its treasury in the future for such purpose; and, further, to compel an accounting between the city and its co-defendant for all money heretofore paid by the former to the latter for the board of female prisoners. The complaint prays for such other and further relief as may be just. When the case was called for trial in the district court, the defendants moved for judgment in their favor on the pleadings. The court granted the motion, and the plaintiff appealed from an order denying his motion for a new trial.

If the allegations of the complaint, as modified by such of the allegations of the answer as the reply admits, would, if proven, entitle the plaintiff to any relief in the premises, it was error on the part of the trial court to grant the motion of the defendants, and direct a judgment in their favor, without a trial; otherwise, not. The material facts which are admitted by the pleadings are substantially these:

The defendant the House of the Good Shepherd is, and has been since January, 1869, a private charitable corporation, duly incorporated under the laws of this state, and is located in the city of St. Paul. Its members are required to be Sisters of the Society of the Good Shepherd, a religious sisterhood of the Roman Catholic faith. "Its general purpose and object is to reform fallen women, and to afford protection to other females whose circumstances in life might endanger their virtue; and its plan of operation to surround the above-mentioned classes of females with virtuous influences, and accustom them to habits of industry and self-respect." This corporation owns, occupies, and exclusively controls a building or home in the city of St. Paul, known as the "House of the Good Shepherd," and has so owned, occupied, and conducted the same since about the year 1869. It has been the custom for many years past for the municipal court of the city of St. Paul to commit female prisoners to

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the House of the Good Shepherd, from time to time, as they were convicted of misdemeanors subjecting them to imprisonment, under the charter and ordinances of the city. Such commitment was pursuant to an ordinance of the city declaring such house to be a workhouse for female prisoners. The city has paid to the House of the Good Shepherd during the past six years, for the board, lodging, and care of such female prisoners, in all $7,200. During the month of April, 1895, it so kept and cared for certain female prisoners of the city, for which it charged $3.25 per week for each prisoner, amounting to $71.50, which amount was allowed by the city, and it was about to pay the same, when this action was commenced. The city of St. Paul has a public workhouse, but it denies that it has facilities for properly caring for female prisoners therein.

There are many other allegations both in the complaint and answer, which are not admitted, but they are all immaterial save two. The complaint alleges that the plaintiff is a taxpayer of the city; also, in effect, that the city threatens to and intends to continue in the future to send its female prisoners to the House of the Good Shepherd, and contract with it for their detention, board, and care, and pay for the same from the public funds of the city. These allegations are put in issue by the answer of the city, but it contains no disclaimer of such intention; on the contrary, it maintains that the ordinance referred to is valid. The answer of the House of the Good Shepherd disclaims any purpose to ask or accept any compensation for the care of such prisoners in the future.

The first and important question presented by the admitted facts is whether the ordinance in question is valid. The city of St. Paul, as a municipal corporation, has only such powers and rights as have been expressly granted to it by the legislature, or which are incident thereto, and necessary to carry those powers into effect.

The authority of the city to enact the ordinance in question is subsection 36, § 3, subc. 4, c. 26, Sp. Laws 1868,[2] which reads thus:

"The common council of said city may provide by ordinance that any one convicted of an offense before the city justice, subjecting such offender to imprisonment under the charter and ordinances of said city, may be kept at hard labor in any workhouse established by said city for that purpose, or in case of a male offender may be kept at hard

[2] See, also, Sp. Laws 1874, c. 1, subc. 4, § 3, subsec. 36.

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labor during his term of imprisonment in such workhouse or upon the public streets and improvements of said city, or both; and may also provide by ordinance that any one convicted of an offense before the city justice as aforesaid, and committed upon non-payment of a fine imposed, may be kept at hard labor in any workhouse of said city as aforesaid, or in case of a male offender, may be kept at hard labor either in such workhouse or upon the public streets and improvements, or both, until such persons shall work out the amount of such fine at such rate of compensation as said common council may prescribe, for a time not exceeding the term of such commitment, and the common council shall have full power to establish by ordinance all needful regulations for the security of such prisoners thus employed, and to prevent escape and insure proper discipline, and shall have power to establish a suitable workhouse in said city for the purpose aforesaid, and under such regulations as the said common council may provide."

This authorized the council of the city to provide by ordinance that any person convicted of an offense punishable by imprisonment under the charter or ordinances of the city, or who was committed for the nonpayment of a fine imposed upon his conviction, might be kept at hard labor in any workhouse established by the city for that purpose. It gives the city full power to establish needful regulations for the security and discipline of such prisoners; also to use the county jail. There is no room for controversy as to the meaning of the term "workhouse" as used in this legislative grant of power to the city. The word, in this state, has a well-defined, popular, and legal signification. It is a place or prison where persons convicted of minor offenses and misdemeanors may be confined and kept at labor. All prisons, jails, and workhouses of this state for the imprisonment of persons convicted of public offenses of any grade must be so far public that the superintendents or keepers thereof must be public officers or agents, whom the courts may command to receive into their custody and detain the persons convicted of crime, and sentenced to be confined therein. Such places of imprisonment, and the keepers thereof, must be subject to the control of the proper public authorities. It was such a public workhouse that the city was authorized to establish. Pursuant to such power, the city jail was, by ordinance approved October 7, 1869, declared to be the workhouse of the city of St. Paul. The chief of police was made its superintendent, and a board of managers, consisting of the junior alderman of each ward, was created, and given general supervision over the workhouse and the management thereof, with authority to prescribe the

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kind of labor at which the prisoners might be employed, and to make all proper rules for the government of such workhouse. On the same day, the ordinance here in question was approved. Its provisions are as follows:

"Section 1. That the charitable institution known as the 'House of the Good Shepherd,' and located in the city of St. Paul, is hereby established and declared to be a workhouse for female prisoners, under the charter and ordinance of said city.

"Sec. 2. It shall and may be lawful for the city justice of said city to commit to the care and custody of the superintendent of said House of the Good Shepherd any female who has been convicted of any offense before him, subjecting such female offender to imprisonment under the charter and ordinances of said city, and said superintendent shall keep such prisoner at hard labor, suitable to her condition, in the said workhouse, for any time not exceeding thirty days to be designated in such commitment. The said superintendent shall have authority to prevent the escape of such prisoners, and to insure proper discipline in said workhouse, and if necessary to require the assistance of the chief of police, or any police officer, to maintain such discipline, and to prevent the escape of such prisoners.

"Sec. 3. Any prisoner committed to said workhouse in default of payment of any fine or costs, may at any time pay the superintendent the amount of such fine or costs, and shall be allowed at the rate of twenty-five cents per day, including board, for her labor in commutation of her fine and costs; and upon such payment, or upon payment of any balance due after deducting work, that may have been performed by her, or upon the prisoner working out the amount of such fine and costs, or if she shall be otherwise legally entitled to her discharge, the superintendent shall set said prisoner at liberty, and shall notify the city clerk of such discharge.

"Sec. 4. Any prisoner committed to said workhouse may be released at any time, upon the resolution of the common council.

"Sec. 5. The superintendent of said workhouse shall make a monthly report to the common council of the number of prisoners received and discharged, and of the amount of fines and costs paid by prisoners, if any, and shall be paid out of the general fund of said city the same compensation per week for the board of said prisoners as is allowed to the keeper of the city jail: provided, that said city shall not become responsible for maintaining or supporting the said workhouse, except for the board of city prisoners under this ordinance."

Clearly, this ordinance is in excess of the authority conferred upon the city, and is void for that reason. As a legal proposition (the question of propriety of so doing aside), the city council had as much power to establish and declare any church in the city a workhouse for female prisoners, and authorize the city courts to commit any

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female convict to the custody of the rector or pastor of the church, and require and authorize him to keep such prisoners at hard labor not exceeding 30 days, and to make monthly reports to the city council, as it had to declare the House of the Good Shepherd, or any other institution not subject to public control, such a workhouse.

A comparison of the ordinance in question with the one establishing the city jail as a workhouse is invited by counsel for the city, and he claims "that the House of the Good Shepherd was made as much a municipal agency for the suppression of crime as the jail was." If by this we are to understand that, after the passage of the ordinances, it was as much a public workhouse as the city jail was, the proposed test will prove fatal to the claim. The city jail, declared by the ordinance to be a workhouse, was a public building, subject to exclusive public control. A superintendent and a board of managers of the workhouse were appointed and created by the ordinance, who were all public officers. In short, a public workhouse was established by the first ordinance. The reverse is true as to the second. The building declared to be a workhouse is the subject of private ownership and private control. No superintendent and board of managers of the supposed workhouse are provided for. The superintendent of the House of the Good Shepherd is not a public officer or agent. Neither the place where the convicts are to be imprisoned nor the managers thereof are in any manner subject to the control of any public authority.

The municipal court has no power by its commitment to command the superintendent to receive and detain prisoners in the House of the Good Shepherd, for it is a private institution, controlled exclusively by a private charitable corporation. As already suggested, the only workhouse the city was authorized to establish was a public workhouse, which should be governed and controlled by municipal authority. The ordinance does not establish such a workhouse. It is void, and all commitments of female prisoners to the House of the Good Shepherd by the city courts are void. It necessarily follows that any contracts on the part of the city, express or implied, for the future detention and support of prisoners in an institution to which such prisoners cannot be legally committed, are also illegal.

But it does not follow from this conclusion that the plaintiff is of right entitled to invoke the aid of a court of equity to enjoin the

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payment of the claim of the House of the Good Shepherd for past services in boarding and caring for such prisoners, or to compel an accounting between it and the city for money paid to it in the past for such services. While it is true that, upon grounds of sound public policy, the doctrine of ultra vires is applied with greater strictness to municipal than to private corporations, and that in this state a taxpayer may enjoin an unauthorized appropriation of public money, yet in cases where the proposed appropriation is only technically illegal, and it would be more inequitable to grant the injunction than to refuse it, it may be refused. The payment of the $71.50, which the plaintiff, as a taxpayer, seeks to enjoin in this case, is not a proposed gratuity to a private party, or to a religious society or school, as claimed by him, but it is honestly due to the House of the Good Shepherd for boarding and caring for prisoners at the request of the city of St. Paul, and at the command of her courts, made pursuant to an ordinance of the city, which has been in force and acquiesced in by citizens and taxpayers for nearly a quarter of a century. Although it is true that, by reason of the invalidity of the ordinance, the city was not authorized to contract for such board and care, yet the contract was made and executed in good faith on one side, before the ordinance was declared invalid by any judicial authority. The city has received full consideration for the proposed payment, and, in equity and good conscience, the claim ought to be paid; and a refusal to enjoin its payment, under such circumstances, by the trial court, was a proper exercise of its discretion.

Whether a taxpayer may, in a proper case, maintain an action in his own name to compel a municipal corporation and parties to whom it has paid public funds fraudulently or on illegal contracts to account as to such funds, and require the amount thereof to be paid to the corporation, is a question which we are not called on to discuss or decide in this case. If such an action can be maintained in any case, the plaintiff has not, by the allegations of his complaint, shown himself entitled to invoke the aid of equity to compel a repayment to the city of the amount heretofore paid by it to its co-defendant for the board and care of its prisoners. Waiving the technical objection that there is no allegation in his complaint that he has requested the city to bring such an action, we are of the opinion that, on the merits, he is not entitled to maintain this action for the purpose of compel-

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ling such repayment, for the simple reason that it would be grossly inequitable to permit him to do so. The reasons we have suggested why the payment of the $71.50 ought not to be enjoined apply with greater force to past payments. It cannot be claimed that the parties to whom the payments were made had any knowledge of the invalidity of the ordinance, or of the judgments of the court committing prisoners to their custody; and the taxpayers of the city have stood by for years, without objecting, while they boarded and cared for such prisoners, and accepted their pay for fair services rendered, relying on the ordinance, judgments, and the contract of the city. Neither the plaintiff nor any other taxpayer is entitled to the aid of equity to compel a repayment to the city of the amounts so received.

But a third claim is made by the plaintiff, to the effect that the city threatens and intends to continue in the future the practice of the past as to committing its female prisoners to the custody of the House of the Good Shepherd, and to enter into contracts with it as to the detention, care, and board of such prisoners, and to pay for the same with public money. If the plaintiff establishes this claim on the trial, he will be entitled to an injunction restraining the city from entering into such unauthorized contracts. Sinclair v. Board of Commrs., 23 Minn. 404. As already stated, the pleadings raise an issue as to the intention and purpose of the city as to continuing the use of the House of the Good Shepherd as a workhouse, and making contracts for the support of its prisoners therein. The plaintiff was entitled to have this issue tried, and the court erred in dismissing the action without a trial of this particular issue.

Order reversed, and a new trial granted.

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FARWELL, OZMUN, KIRK & CO. v. AI BROOKS and Another.[1]

June 19, 1896.

Nos. 9936—(196).

Assignment by Partners for Benefit of Creditors—Validity.

A deed of assignment by partners for the benefit of creditors, in order to be valid, must on its face be sufficient to assign, not only the partnership property, but also all of the nonexempt separate property of each of the partners.

Same—Separate Property of Partner.

An assignment was executed as follows: "Brooks & Co., by W. M. Brooks. Ai Brooks." *Held* not to pass the separate property of W. M. Brooks.

Action in the district court for Becker county against Ai Brooks and William M. Brooks, copartners under the firm name and style of Brooks & Co. After recovering judgment against defendants for $1,572.40, plaintiff instituted garnishment proceedings against Charles A. Wright, from whose disclosure it appeared that he had received certain property of defendants by virtue of an assignment to him for the benefit of creditors. Plaintiff served a supplemental complaint, and the issues raised by it and by the garnishee's answer and by the reply were brought on for trial before Searle, J., who made an order granting the garnishee's motion for judgment on the pleadings and for a dismissal of the action as against the garnishee. From a judgment entered in pursuance of this order, plaintiff appealed. Reversed.

The deed of assignment (Exhibit A), so far as material, was as follows:

Know all men by these presents, that whereas, Ai Brooks and W. M. Brooks, copartners under the firm name and style of Brooks & Co., of Randall, Morrison county, Minnesota, are indebted to divers persons in considerable sums of money, and by reason of losses and misfortunes are at present unable to discharge their just debts and liabilities as they mature, and are by reason thereof insolvent and are willing to assign all their property for the benefit of all their creditors who shall file releases of their claims, as provided by law, without any preference, under and by virtue of Chapter 148, General Laws of 1881, and acts amendatory and supplemental:

Now, therefore, this indenture made this 27th day of May, A. D.

[1] Reported in 68 N. W. 5.

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1893, between said Ai Brooks and W. M. Brooks, copartners as Brooks & Co., parties of the first part, and Charles A. Wright, of Duluth, state of Minnesota, party of the second part: Witnesseth, that the parties of the first part, in consideration of the premises and the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, assigned, transferred and set over * * * unto the said Charles A. Wright, party of the second part, his heirs and assigns, all the lands, tenements, hereditaments and appurtenances, goods, chattels, choses in action, claims, demands, property and effects of every description, belonging to the parties of the first part, wherever the same may be situated, except such property as is by law exempt from levy and sale on execution. To have and to hold the same, and every part thereof, to the said party of the second part, his heirs and assigns, in trust nevertheless for the uses and purposes following: * * * In witness whereof, said parties of the first part have hereunto set their hands and seals the day and year first above written.

Brooks & Co. (Seal)
By W. M. Brooks. (Seal)
Ai Brooks. (Seal)

The deed was duly witnessed, and was acknowledged by W. M. Brooks "as his free act and deed, and the free act and deed of Ai Brooks and W. M. Brooks, copartners as Brooks & Co.," and was also acknowledged by Ai Brooks as his free act and deed.

Warner, Richardson & Lawrence, and *A. J. Galbraith*, for appellant.

William C. White, for respondent.

MITCHELL, J. The only question is as to the validity of the deed of assignment (Exhibit A of the complaint) purporting to have been executed for the benefit of creditors pursuant to the provisions of the insolvent law of 1881.[2] The only authorized assignment under this statute is of all the debtor's property not exempt from execution. Hence an assignment by partners of partnership property exclusively is upon its face partial, and not general. To be valid, it must appear on its face that it assigns, not only the partnership property, but also all of the nonexempt individual property of each of the partners. May v. Walker, 35 Minn. 194, 28 N. W. 252; In re Allen, 41 Minn. 430, 43 N. W. 382; Thompson v. Winona Harvester Works, 41 Minn. 434, 43 N. W. 383.

[2] Laws 1881, c. 148. See G. S. 1894, §§ 4240–4254.

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The assignment under consideration is partial, and hence invalid, because it does not assign, or purport to assign, the individual property of W. M. Brooks, one of the partners. Conceding, without deciding, that under the decision in Security Bank v. Beede, 37 Minn. 527, 35 N. W. 435, this assignment, if executed by both partners as individuals, would have passed their separate as well as their partnership property, yet the fact remains that it has not been so executed by W. M. Brooks. The execution of the deed by the other partner, Ai Brooks, individually, could, of course, have no effect to pass the separate property of W. M. Brooks. Neither could the signature of the firm name of "Brooks & Co." by W. M. Brooks have any such effect; for while it is true that a partnership is not a person distinct from its members, and the only office of a firm name is identification and abbreviation as an agreed sign or adopted symbol to represent and include the individual members of the partnership, yet the partnership name has the additional signification that a partnership act is denoted by its use. Hence there would be no ground for claiming that a deed of the tenor of this instrument, with merely the firm name affixed, would pass the separate property of either partner; and the addition of the words "by W. M. Brooks" adds nothing. It merely indicates that the firm name was signed by W. M. Brooks. Neither is there any ambiguity in the form of the execution of the instrument which would admit of explanation by parol evidence. There is no analogy in this respect between deeds conveying property and instruments, such as promissory notes, creating a liability on the part of the firm. In the latter case, each partner being the agent of the other as to all matters within the scope of the partnership business, both are liable, whichever executes the obligation.

The main dependence of counsel for the garnishee is the fact that W. M. Brooks acknowledged that he executed the instrument, "as his free act and deed, and the free act and deed of Ai Brooks and W. M. Brooks, copartners as Brooks & Co." It is urged that this shows that he adopted the words "by W. M. Brooks" as his individual signature. If the signature was on its face ambiguous, and subject to explanation by parol evidence as to the capacity in which he executed it, there might be some force in this argument; but there is no such ambiguity, and the acknowledgment of the execution of a deed cannot enlarge or change the effect of the instrument itself as

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a conveyance. It has been the settled doctrine of this court from the outset that deeds of assignment for the benefit of creditors must be executed in accordance with the statute, and must show on their face, without resort to any extraneous evidence, that they convey all the nonexempt property of the debtors. Public policy requires that this rule be strictly adhered to.

Judgment reversed.

ELON G. HOLMES and Another v. AI BROOKS and Another.[1]

June 19, 1896.

Nos. 9937—(197).

Action in the district court for Becker county against Al Brooks and William M. Brooks, copartners under the firm name and style of Brooks & Co., defendants, and Charles A. Wright, garnishee. From a judgment, dismissing the action as against the garnishee, entered in pursuance of the order of Searle, J., plaintiffs appealed. Reversed.

Warner, Richardson & Lawrence, and *Jeff H. Irish*, for appellants.

William C. White, for respondents.

MITCHELL, J. This case involves the same question as Farwell, Ozmun, Kirk & Co. v. Brooks, supra, p. 184.

Judgment reversed.

FIRST NATIONAL BANK OF SHAKOPEE v. MARY M. HOW.[2]

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Case 2
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Case 2
85 174

June 19, 1896.

Nos. 9947—(161).

Co-operative Life Insurance—Exemption—Constitution—Title of Act.

G. S. 1894, § 3312, providing that the money to be paid by co-operative or assessment life insurance associations shall be exempt from execution, construed, and *held*, following In re How, 61 Minn. 217, that it exempts such money from execution after it has been paid to, and while it remains in the hands of, the beneficiary named in the certificate or policy of such associations. *Held*, further, that the statute of which this section is a part does not include more than one subject, and is constitutional.

[1] Reported in 67 N. W. 1150.

[2] Reported in 67 N. W. 994.

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Appeal by plaintiff from an order of the district court for Scott county, Cadwell, J., denying a motion for the appointment of a receiver. Affirmed.

Southworth & Coller, for appellant.

H. J. Peck and *Warner, Richardson & Lawrence*, for respondent.

START, C. J. The plaintiff is a judgment creditor of the defendant, and on July 15, 1895, it instituted supplemental proceedings against her. Upon her disclosure in such proceedings the plaintiff moved the district court for the appointment of a receiver of certain money in her hands for the purpose of applying it to the payment of the plaintiff's judgment. This motion was opposed by the defendant on the ground that the fund or money so in her hands was exempt. The court denied the motion on that ground, and from its order the plaintiff appealed.

The further material facts, as they appear from the record and the findings of the trial court, are in substance these: The husband of the defendant, David L. How, died in December, 1893, leaving certain certificates and policies of insurance upon his life, of the aggregate amount of $15,000, in a number of co-operative assessment associations and insurance companies, in which the defendant was named as the beneficiary. After the death of her husband, and on February 17, 1894, the defendant duly made an assignment for the benefit of her creditors, and in the schedule of her assets these certificates and policies were set forth, but were claimed by her as exempt. The creditors of the defendant, including the plaintiff, claimed that the certificates and policies and the amounts due thereon were not exempt. A hearing was had on the respective claims of the defendant and her creditors in the insolvency proceedings in the district court, which held that the certificates and policies, and all of them, and the amount due thereon, were exempt from execution, and that they did not pass to the assignee for the benefit of creditors by the deed of assignment. The plaintiff in this case, with other creditors, appealed from this decision of the district court to this court, which affirmed the decision of the trial court. In re How, 59 Minn. 415, 61 Minn. 217, 61 N. W. 456, 63 N. W. 627. After the decision of this court holding that the certificates and policies and the amount due thereon were exempt, and therefore did not pass to the assignee,

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the defendant collected on these identical certificates and policies the sum of $9,675, and now has this amount. It is this fund so paid to the defendant on the certificates and policies involved in the former appeal, which she still retains, that the plaintiff seeks to have applied to the payment of its judgment through the appointment of a receiver.

The question whether this fund is exempt in the hands of the defendant was, in effect, decided by the decisions of this court in In re How. The statute under which the exemption is claimed is this:

"The money or other benefit, charity, relief or aid to be paid, provided or rendered by any corporation, association or society authorized to do business under this act shall be exempt from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of a member." G. S. 1894, § 3312.

This statute exempts the fund from execution at the suit of the creditors of the beneficiary as well as from seizure by the creditors of the deceased member, and is constitutional. Brown v. Balfour, 46 Minn. 68, 48 N. W. 601; In re How, supra.

It is claimed, however, by the plaintiff, that the question whether the money, of which the certificates and policies were the representatives, was exempt after it was paid over by the associations to the beneficiary, and while it remained in her hands, was not decided in the former case, but was expressly reserved. This is a misconception of the opinion of the court in that case. The question involved therein was not whether the certificates, policies, and the money due thereon were exempt before the money was paid over to the beneficiary, but whether the money or fund was exempt from an execution against her, or whether the certificates, policies, and the money due thereon passed by her deed of assignment as nonexempt property to her assignee for the benefit of her creditors. It was held that they did not pass to the assignee, and the decision of the district court, holding that all of the policies and the amount due thereon were exempt from execution, and that the assignee was not entitled to any part thereof, was affirmed. It is true that the specific question whether the money due on the certificates or policies would be exempt after it was paid to the beneficiary was not discussed in the former opinion, for the reason that it was assumed by the court and

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counsel that, if the statute was constitutional, the money due on the policies was exempt in the hands of the beneficiary. The decision of the trial court could not have been affirmed on any other basis, because this money due on the policies was not property acquired after the defendant made her assignment, but the right to the money vested in her at the death of her husband, and before her assignment. If it was not exempt in her hands, it belonged to her assignee for the benefit of her creditors, as soon as she received it; and the order of the trial court to the effect that the assignee was not entitled to the amounts due on the policies would have been error.

The reservation in the opinion in the former case is in these words:[2] "Whether or not these funds will always remain exempt after they reach the hands of Mary M. How, and whether they may not lose their exempt character, the same as other exempt property, or the proceeds thereof, when converted into property not exempt, we do not decide." In this there is no suggestion that the funds will not be exempt when and as soon as they reach the hands of the beneficiary, but the suggestion is whether they will always remain exempt in her hands, or, like other exempt property, they may not lose their exempt character when converted into property not exempt. The latter is the only question which we did not decide in the former case. The very reason assigned in the opinion for holding the statute constitutional necessarily assumes that the intention of the statute was to exempt from execution the money in the hands of the beneficiary or donee. The question whether this fund is exempt in the hands of the beneficiary is no longer an open one. It was settled in favor of the defendant in the case to which we have referred.

But, if it was an open question, we are of the opinion that the statute in question was intended to and does exempt from execution the money or fund paid by co-operative and assessment life insurance associations on their policies after it is received by the beneficiary. The statute was intended to secure to the widow and children of a deceased member a fund for their support after the death of the husband and father; and, in order to render it certain that its beneficent purpose should not be defeated, it exempts the fund from execution. To interpret the statute so as to exempt the fund only while

[2] 61 Minn. 218.

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it is in the hands of the association would defeat the purpose of the law, and justly expose the legislature to the charge of paltering with the beneficiary in a double sense. What benefit is it to an unfortunate widow to be mockingly told that the money provided by her husband for her support is exempt from execution so long as it remains in the hands of the insurance company, where it can do her no possible good, but, when she reaches out her hand to take the money, her creditors may wrest it from her grasp. Such is not the meaning of the statute. It exempts the money from execution in the hands of the beneficiary.

This construction does not render the statute unconstitutional, as including more than one subject, as claimed by the plaintiff. The protection of a fund secured to a beneficiary through the instrumentality of co-operative or assessment life insurance associations by exempting it from execution is so intimately connected with the subject of the incorporation and regulation of such associations as to be included in the provisions of the statute in question, the title of which is "An act to provide for incorporation and regulation of co-operative or assessment life, endowment and casualty insurance associations and societies." Laws 1885, c. 184; Board of Supervisors v. Heenan, 2 Minn. 281 (330); State v. Kinsella, 14 Minn. 395 (524); State v. Cassidy, 22 Minn. 312.

Order affirmed.

JOSEPH ALT v. JOHN GRAFF and Another.[1]

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June 19, 1896.

Nos. 9963—(137).

Mortgage by Minor—Estoppel.

A minor is not estopped to set up his infancy as a defense to a mortgage by the fact that at the time of its execution he represented that he was of age. Conrad v. Lane, 26 Minn. 389, followed.

Same—Avoidance of Mortgage.

Held, also, that upon the evidence the court was justified, within the rule of Johnson v. Northwestern M. L. Ins. Co., 56 Minn. 365, in declaring the mortgage void.

[1] Reported in 68 N. W. 9.

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Appeal by defendant Graff from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Affirmed.

Armstrong Taylor, for appellant.

S. Meyers, for respondent.

MITCHELL, J. The complaint is in the ordinary form in the statutory action to determine adverse claims to real estate. In his answer the defendant asserts as his claim to the property a lien under a mortgage executed by the plaintiff. The reply admits the execution of the mortgage, but alleges that it was without consideration; also that plaintiff was a minor when he executed the mortgage, and that for that reason it was void.

The point is made by the defendant that this was not the proper form of action; that plaintiff ought to have alleged in his complaint the facts which he has alleged in his reply, and asked that the mortgage be adjudged void. This is not in accordance with the decisions of this court. The object of an action under the statute to determine an adverse claim to real estate was stated in Walton v. Perkins, 28 Minn. 413, 10 N. W. 424, to be to force one claiming an adverse claim or lien to establish or abandon his claim; that with respect to the claim of the defendant the position of the parties is the reverse of that occupied by the parties to an ordinary action; that the defendant becomes practically plaintiff, and takes the affirmative in pleading and proof, while the plaintiff becomes practically the defendant, and defends against the claim. And in Walton v. Perkins, 33 Minn. 357, 23 N. W. 527, it was held that any interest in or lien upon land may be determined in such an action. This is in accordance with all the decisions of this court, as well as the uniform practice in this state from the earliest date. State v. Bachelder, 5 Minn. 178 (223); Barber v. Evans, 27 Minn. 92, 6 N. W. 445; School Dist. No. 73 v. Wrabeck, 31 Minn. 77, 16 N. W. 493; Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13; Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Scofield v. Quinn, 54 Minn. 9, 55 N. W. 745.

On the trial the contest centered entirely on the question whether the plaintiff was entitled to have the mortgage adjudged void on the ground of his minority at the time of its execution. The evidence

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was ample to justify the findings that he was a minor when he executed the mortgage, and that he seasonably disaffirmed it after he attained his majority.

The material facts bearing on the other questions in the case were as follows: Plaintiff owned a small farm of 25 acres, which he had inherited from his mother. The farm was occupied and cultivated by his father, and not by the plaintiff, although he lived on it with his father. In 1892 the defendant, who was a dealer in horses, sold a span of horses to the father on credit, and as security for the purchase money took from him a chattel mortgage for $120 on the horses and what few farming implements he had, consisting of an old wagon, an old buggy, some harness, and an old harvester. In 1893, after this mortgage fell due, the defendant, having "camped" in the neighborhood with some horses which he was taking north, sent word to the father, requesting payment. The father having failed to pay, the defendant sent the sheriff to take the property on the mortgage. This being resisted by both father and son, the defendant brought an action in replevin, and took possession of the mortgaged property. Thereupon both father and son came to town to see the defendant about a settlement of the matter. The parties disagree in their testimony as to whether they came in of their own accord or at the instance of an employé of the defendant, named Carpenter, sent out by him for that purpose. The plaintiff and his father came in on July 26, and by the 28th the following result was reached: Defendant retained all the mortgaged property already in his possession (apparently of no great value), discharged the debt against the father, sold and delivered to plaintiff a span of mares, and obtained from him a mortgage on plaintiff's 25 acres for $500, payable in three years, with 8 per cent. interest, and entered into an agreement with plaintiff that he (plaintiff) was to take care of and raise for one year a pair of sucking colts that were with the mares, and that at the end of the year each party should own an undivided half of them, and that whichever took them should pay the other $150. The plaintiff immediately sold both mares and colts to one Brady for $2 cash and his note for $398, payable in a year. It conclusively appears that Brady was wholly irresponsible, and that plaintiff had never seen or heard of him before. It will be seen that the upshot of the whole matter was that when plaintiff came in on

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the 26th he owned his farm of 25 acres and owed nothing, and that by the 28th he had a mortgage for $500 on his land, and besides that owed defendant $150 on account of the colts, and had nothing to show for all this indebtedness except a worthless note against Brady for $398.

It clearly appears from the record that plaintiff, although approaching the age of 20 years, was very ignorant, and wholly incapable of intelligently protecting his own interests in any business transaction of importance. It is also very apparent that the same was equally true of his father. The parties disagree as to what occurred during the negotiations from the 26th to the 28th. Plaintiff and his father testify that during that time defendant took them into saloons, and plied them with liquor until they became incapable of transacting business; that the terms of the settlement were all agreed on before they ever saw the horses which defendant was to give the plaintiff; that when plaintiff and his father saw the horses which defendant proposed to deliver they objected, and declined to receive them, because they were of too light weight for a farm; that defendant insisted on their taking them, and promised to find plaintiff a purchaser for them if he did not wish to keep them; and that it was defendant's employé, Carpenter, who produced Brady as such purchaser. Defendant, corroborated by some other evidence, denies all this, and testifies that he never gave them any liquor, that they had seen and agreed on the span of mares before the settlement was closed, and that he had never seen or heard of Brady, and had nothing whatever to do, directly or indirectly, with bringing about the sale to him by plaintiff.

It also appears that during the progress of the negotiations it was brought to defendant's knowledge that plaintiff's stepmother claimed that he was not of age. Plaintiff and his father testify that defendant told them to tell the attorney who was to draw the mortgage that the plaintiff was of age. On the other hand, defendant, corroborated by the attorney, testifies that the question of plaintiff's age was called up in view of what the stepmother had stated, and that both plaintiff and his father positively asserted that he was of age, and offered to make an affidavit to that effect. The facts, however, are undisputed that before the mortgage was executed the question of plaintiff's minority was called to defendant's notice, and that

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he took no steps to ascertain the facts except to inquire of plaintiff and his father, and elicit their assertion that he was of age. There is no evidence as to the value of the mares except defendant's statement in his testimony that they were well worth $450. As they only weighed 1,050 to 1,100 pounds each, they must have been well-bred stock to be worth that much, in view of the depressed condition of the market at that time. Plaintiff himself had no use for horses at that time, much less of any such high-priced stock,—a fact which defendant must have known.

The court ordered the note and mortgage canceled on condition that plaintiff deliver to defendant the $398 note against Brady. We are of opinion that, even leaving out of consideration those facts upon which the evidence was conflicting, the decision of the court was entirely correct.

The plaintiff was not estopped to set up his infancy because of his false representations as to his age. Conrad v. Lane, 26 Minn. 389, 4 N. W. 695. Without stopping to inquire whether there may not be exceptions to this general rule, there are no facts in this case to make it exceptional. The burden was on the defendant to show that the contract was a fair and reasonable one, and free from fraud and overreaching on his part. Johnson v. Northwestern M. L. Ins. Co., 56 Minn. 365, 57 N. W. 934, and 59 N. W. 992. This, in our opinion, he has not done. When the manifest ignorance, business incompetency, and financial condition of the father and son are considered, the transaction would have been morally, if not legally, unfair and overreaching, even if both of them had been of age. Defendant must have known that the deal was a most improvident one for people in their situation. Neither of them—the son especially—had any use for such high-priced horses. With their limited means, to incur such an amount of debt meant probable financial ruin. The old horses taken on the chattel mortgage would, so far as appears, have been sufficient for the purposes of the father on the little 25-acre farm. If defendant had been actuated merely by an honest purpose to secure his debt against the father, and by a proper regard for the interests of the parties, he would have been much more likely to have proposed taking a mortgage on the land to secure that debt, and return the property taken on the chattel mortgage, than to sell them a high-priced team, and load them with such a burden of debt. The

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entire transaction tends to show that defendant's aim was to use the strait in which they were placed for the purpose of securing an advantageous sale of another span of horses, on terms which he must or ought to have known were exceedingly improvident on the part of this boy, even if he had been of age. The court did the defendant no injustice in ordering the mortgage canceled on condition of plaintiff's giving him all he had ever received out of the deal. In view of some things said in the briefs, it is but justice to say that there is nothing in the record that in the slightest degree reflects on the conduct of defendant's attorney who drew the mortgage.

Order affirmed.

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MARY LOMMEN v. MINNEAPOLIS GASLIGHT COMPANY.[1]

June 19, 1896.

Nos. 9992—(237).

Constitution—Struck Jury.

Laws 1895, c. 328, entitled "An act to provide for struck juries," etc., is not in conflict with the constitutional provisions that "the right of trial by jury shall remain inviolate," [2] and that "every person * * * ought to obtain justice freely and without purchase." [3]

Same.

Neither is it obnoxious to the constitution as "class legislation."

Action in the district court for Hennepin county.

Defendant, at the proper time, filed with the clerk a demand for a struck jury. At the time designated by the sheriff for striking the jury, plaintiff appeared and filed with him written objections to the proceeding, on the ground that the act authorizing struck juries was unconstitutional. The sheriff, nevertheless, did strike a jury. On the first day of the term, plaintiff gave notice of a motion to quash the struck-jury proceedings, based on the fact that no venire had been issued or made returnable for the first day of the term, and also on the ground that all the proceedings were null and void, by reason of the unconstitutionality of the struck-jury law. This mo-

[1] Reported in 68 N. W. 53. [2] Const. art. 1, § 4. [3] Const. art. 1, § 8.

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tion was denied. A venire for the jury struck by the sheriff was then issued, returnable on the day for which the case had been set for trial, on which day at the call of the calendar, the struck jury having been called, plaintiff filed a motion to quash the venire for the reason that all proceedings had in the matter were unauthorized, null and void, and because the act providing for struck juries was unconstitutional, contrary to the letter and spirit of the constitution, contrary to public policy, and null and void. When the case was reached, the jury being called, plaintiff submitted this motion, which was denied by the court, Belden, J., and an exception was allowed. Before the jury was sworn, plaintiff moved the court to have a jury come from the county at large, and insisted upon her constitutional right to have the action tried by a jury summoned, drawn and selected in the usual manner, and objected to the trial of the action by a struck jury. The court overruled this motion, denied plaintiff's demand and overruled her objection, to which several rulings exceptions were taken. As the struck jury was about to be sworn, plaintiff again objected to the swearing of the jury, for the reason that it was not such a jury as was guarantied by the constitution. This objection was overruled, and plaintiff excepted. The struck jury was sworn, and the trial resulted in a verdict for defendant. Thereafter, on a bill of exceptions, plaintiff moved for a new trial, on the grounds: (1) Of irregularities in the proceedings of the court, by which plaintiff was prevented from having a fair trial, in that the court refused a jury trial, and denied plaintiff a trial by jury as guarantied by the constitution; and (2) for errors in law, occurring at the trial and duly excepted to, to wit, the rulings on plaintiff's motions and objections with reference to the struck jury. The motion for a new trial was denied, and judgment on the merits was entered in favor of defendant. From the judgment, plaintiff appealed. On the appeal, error in the overruling of plaintiff's different motions on the ground that the jury had not been summoned for the first day of the term was expressly waived, and a decision was invoked on the merits. Affirmed.

Jno. W. Arctander and *Ludwig Arctander*, for appellant.

The struck-jury law is in conflict with Const. art. 1, § 4. This guaranty does not have reference to jury trials as they existed at common law in England, or as they then existed in other states; but

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means that the trial by jury, in its essential and substantial features, as it existed in the territory of Minnesota at the time of the adoption of the constitution, shall remain inviolate, and that the legislature is prohibited from enacting any novel mode of jury trial, in any substantial manner different from the jury trial as it existed in the territory at the time, and as the then laws of the territory prescribed. 3 Am. & Eng. Enc. Law, 731; Trigally v. Memphis, 6 Coldw. (Tenn.) 385; State v. McClear, 11 Nev. 39; East Kingston v. Towle, 48 N. H. 64; Pomeroy's Note to Sedgwick, St. & Const. Law (2d Ed.) 487; Copp v. Henniker, 55 N. H. 179; Norval v. Rice, 2 Wis. 22; Whallon v. Bancroft, 4 Minn. 70 (109); State v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 41 N. W. 1020. Not every change in the mode of selecting or securing a jury from that then existing would be an invasion of the constitutional guaranty. Provided trial by jury is maintained in its essential, substantial, and fundamental elements, as then existing and recognized, the legislature has the right to make such changes in the mode of selecting, summoning and procuring the jury as changed conditions might in their judgment warrant. Proffatt, Jury Trial, § 84. These elements are: (1) Impartiality of the jurors; (2) number; (3) unanimity. To these may be added: (4) The right of peremptory challenge. In England, at common law, the sheriff selected the panel from the list of freeholders, he having power to summon whom he chose. This resulted frequently in packed juries. The American states from the beginning took the power of selection out of the hands of the sheriffs, and practically all, with the single exception of Missouri, ordained that the power of selecting the primary list should be vested in a board of several members. The selection from the primary lists for the term panels, from the earliest days, in practically all the states, has been made by fortuitous drawing; and the selection of the panel for the particular case is made in the same manner. Proffatt, Jury Trial, §§ 114, 127, 146, 152. To this element of chance, as essential in securing impartiality, the policy of the law in the territory at the time of framing the constitution was committed. Rev. St. 1851, c. 8, art. 1, §§ 15, 16; Id. c. 126, §§ 146, 149; Id. c. 115, §§ 1, 5, 6; Id. c. 126, §§ 151, 153, 160; Pub. St. 1858, c. 112, § 8; Rev. St. 1851, c. 126, § 160. The element of chance is eliminated by the struck-jury law. The first struck-jury law in Minnesota was Laws 1864, c. 31; nor

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was such a jury known in Wisconsin while we were part of that state. The argument is not weakened by the territorial statutes providing for summoning talesmen when a jury could not be obtained from the regular panel, since this was required by the necessities of the case. Steele v. Malony, 1 Minn. 257 (347). Deprivation of the right of peremptory challenge is an essential differentiation from the constitutional jury trial. Proffatt, Jury Trial, § 155; Cooley, Const. Lim. 319. The territorial law recognized this right. Rev. St. 1851, c. 71, § 17. No right of peremptory challenge is given by the struck-jury law, or can be allowed as to the original panel, or as to talesmen called. Branch v. Dawson, 36 Minn. 193, 30 N. W. 545; Watson v. St. Paul City Ry. Co., 42 Minn. 46, 43 N. W. 904.

The act is in conflict with Const. art. 1, § 8. The act gives to the man who can purchase a struck jury more than justice. Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458. If, like the special jury at common law in England, and in New York, New Jersey and Michigan, the right to this jury was granted only when it was made to appear to the court in its sound discretion that a special and particular reason existed for resorting to it (Proffatt, Jury Trial, § 72), this constitutional objection would have less force. See 3 Blackst. Com. 349.

The act is void, as being contrary to the spirit of the constitution, contrary to public policy, and as furnishing an opportunity for corruption and oppression. The law is not less unconstitutional because of acquiescence. Perkins v. Scott, 57 N. H. 55; Bentham's Elements of the Art of Packing Juries, 26.

A. B. Jackson, for respondent.

Similar laws have been held constitutional. O'Brien v. Minneapolis, 22 Minn. 378; Mark v. St. Paul, M. & M. Ry. Co., 32 Minn. 208, 20 N. W. 131; Branch v. Dawson, 36 Minn. 193, 30 N. W. 545; Watson v. St. Paul City Ry. Co., 42 Minn. 46, 43 N. W. 904. The law is not open to the objection that it is class legislation. State v. Cooley, 56 Minn. 548, 58 N. W. 150; Johnson v. Chicago, M. & St. P. Ry. Co., 29 Minn. 425, 13 N. W. 673; Schimmele v. Chicago, M. & St. P. Ry., 34 Minn. 216, 25 N. W. 347; Johnson v. St. Paul & D. R. Co., 43 Minn. 222, 45 N. W. 156; Lavallee v. St. Paul, M. & M. Ry. Co., 40 Minn. 249, 41 N. W. 974. The law is not in conflict with Const. art. 1, § 8; Willard v. County Commrs., 22 Minn.

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61; 3 Am. & Eng. Enc. Law, 725, and notes. See McDonald v. Achell, 6 S. & R. 240; Vierling v. Stifel Brewing Co., 15 Mo. App. 125; Conley v. Woonsocket Inst., 11 R. I. 147; Adams v. Corriston, 7 Minn. 365 (456); Gesford v. Critzer, 2 Gilm. (Ill.) 698; Beers v. Beers, 4 Conn. 535. The law is not in conflict with Const. art. 1, § 4. It was not the intention of the framers of the constitution to impose any restriction on the legislature as to the manner in which a jury should be selected and obtained. Jones v. State, 1 Ga. 610; Boon v. State, 1 Ga. 618; State v. Wilson, 48 N. H. 398; People v. Harding, 53 Mich. 49, 18 N. W. 555; Hartzell v. Commonwealth, 40 Pa. St. 462; Stokes v. People, 53 N. Y. 164; Dowling v. State, 5 S. & M. (Miss.) 682; Cregier v. Bunton, 2 Strob. (S. C.) 487; Flint River S. Co. v. Foster, 5 Ga. 194; Walter v. People, 32 N. Y. 147, 159; Commonwealth v. Dorsey, 103 Mass. 413; Warren v. Commonwealth, 37 Pa. St. 45; State v. McClear, 11 Nev. 39; Hudgins v. State, 2 Ga. 173; State v. Hoyt, 47 Conn. 518; Colt v. Eves, 12 Conn. 251; Perry v. State, 9 Wis. 21; State v. Ryan, 13 Minn. 343 (370).

At the time of adopting the constitution, the people of the territory were enjoying a guaranty of the right of trial by jury made originally by the act of congress of 1787 providing for government for the Northwest territory, confirmed by the Act of Congress of 1836, when they became inhabitants of the territory of Wisconsin, and again in 1849 when they became inhabitants of the territory of Minnesota. The people throughout the Northwest territory were familiar with struck juries, and each state carved out of this territory, after adopting a constitution which provided for the preservation of the right of trial by jury, provided for struck juries identical with our own. In 1831 the Ohio legislature passed a law similar to ours, except that the right was discretionary with the court. In 1853 this law was changed, so as to make the right absolute to either party. See St. Ohio 1841, c. 64, § 22; Swan's Rev. St. 1854, c. 62, § 30; 2 Rev. St. 1880, §§ 5185, et seq.; Sutton v. State, 9 Ohio, 133; Whitehead v. State, 10 Oh. St. 449; State v. Moore, 28 Oh. St. 595; Stewart v. State, 1 Oh. St. 66; Cleveland, P. & A. R. Co. v. Stanley, 7 Oh. St. 156; Cooke's St. Ill. 1858, p. 271; Rev. St. Mich. 1838, pt. 3, tit. 2, c. 5, § 19; Rev. St. Wis. 1849, c. 86, § 17; Rev. St. Wis. 1858, c. 120, § 82; St. Iowa 1851, c. 105, § 1776.

The framers of the constitution had in mind the trial by jury as

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it existed generally, and not merely as it may have happened to be regulated by the local statute of the territory. Hartzell v. Commonwealth, 40 Pa. St. 462; East Kingston v. Towle, 48 N. H. 64; Keddie v. Moore, 2 Murphy (N. C.) 41; Thompson & Merriam, Juries, §§ 23, 24, and notes; Perry v. State, 9 Wis. 15. See Minnesota Convention Debates, 79 et seq.; Proffatt, Jury Trials, §§ 71, 75; Rev. St. 1851, c. 69, art. iv. §§ 57–60; Pub. St. 1858, c. 59, §§ 67–69; Steele v. Malony, 1 Minn. 257 (340); Dayton v. Warren, 10 Minn. 185 (233); State v. McCartey, 17 Minn. 54 (76).

Koon, Whelan & Bennett, in support of the constitutionality of Laws 1895, c. 328, by consent.

In the ordinance of July 13, 1787, creating the Northwest territory, it was provided (article II.) that "the inhabitants of the said territory shall always be entitled to the benefit of * * * the trial by jury." "No man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land." January 11, 1805, the territory of Michigan was created, and it was provided (2 U. S. St. 309) "that the inhabitants thereof shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States, northwest of the River Ohio, by the said ordinance." April 12, 1827, the legislative council of the territory of Michigan enacted: "An act concerning grand and petit juries" (See 2 Terr. Laws [Michigan] p. 467), in which sections 16, 17 and 18 provided for struck juries. May 30, 1828, the legislative council of the territory of Michigan re-enacted the above law verbatim, with an unimportant exception. See 2 Terr. Laws pp. 658, 659, §§ 19, 20, 21. April 23, 1833, this law was re-enacted without change. See 3 Terr. Laws, pp. 1246, 1247, §§ 16, 17, 18. This law was a part of the law of the territory of Michigan at the time of the creation of the territory of Wisconsin, April 20, 1836. The territory of Wisconsin included all of what is now the State of Minnesota. The organic act of the territory of Wisconsin made the above law part of the law of the territory. 5 U. S. St. p. 15, § 12. Nor had it been repealed or altered when the territory of Minnesota was created out of the territory of Wisconsin; and, being the law of Wisconsin, it became the law of the territory of Minnesota, by the organic act of that territory. 9

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U. S. St. p. 407, § 12. This law was the law of the territory of Minnesota, until September 1, 1851, when it was repealed by the general repealing act of the Revised Statutes of 1851. See Laws 1864, c. 31; G. S. 1866, c. 122; Id. c. 71, §§ 15–19; G. S. 1878, c. 71, §§ 15–19; Laws 1891, c. 84.

Laws 1895, c. 328, is not in conflict with Const. art. 1, § 4. The effect of this article is to continue unimpaired and inviolate the right of trial by jury, as it existed in the territory of Minnesota, at the time of the adoption of the constitution; and it neither adds to nor takes from that right, except that the right is, by this article, extended to all "cases in law, without regard to the amount in controversy." Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; State v. West, 42 Minn. 147, 43 N. W. 845; State v. Minnesota T. Mnfg. Co., 40 Minn. 213, 41 N. W. 1020; Whallon v. Bancroft, 4 Minn. 70 (109). The constitution was adopted October 13, 1857. G. S. 1894, p. cxii; Ex rel. Parker v. Smith, 3 Minn. 164 (240). The right of trial by jury, as it existed in the territory at the time of the adoption of the constitution, was such as was given by the then existing laws of the territory. These laws were the common law and the statute law then in force. The common law of England, so far as it was applicable to our situation and government, prevailed in the territory. State v. Pulle, 12 Minn. 99 (164); Pyeatt v. Powell, 10 U. S. App. 200, 2 C. C. A. 367, and 51 Fed. 551. Immemorial usage is looked to as determining the right of trial by jury under such a general clause as Const. art 1, § 4. Wiggins v. Williams, 18 South. 859; Plimpton v. Somerset, 33 Vt. 283; North Pa. Coal Co. v. Snowden, 42 Pa. 488; Norris Appeal, 64 Pa. 275; Watts v. Griffin, 6 Litt. (Ky.) 244. Under the common law a jury must consist of twelve men, who must agree in order to render a verdict. 3 Blackst. Com. 352; 1 Thompson, Trials, § 3; 24 Lawyers' Rep. 272, and note; Cruger v. Hudson River Ry. Co., 12 N. Y. 190; Work v. State, 2 Oh. St. 297. Opinion of the Justices, 41 N. H. 550. The right of trial by jury implies a right to an impartial jury. 3 Blackst. Com. 353; 2 Kent, Com. 12; 1 Thompson, Trials, 1; Diveny v. City of Elmira, 51 N. Y. 506; Melson v. Dickson, 63 Ga. 682. The jury must consist of men well qualified and lawful. These and other indispensable qualifications of a jury were required by the common law.

The essential elements of the right of trial by jury, at common law,

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are the right (1) to a body of twelve men for the trial of a cause; (2) to have them each lawful, upright and well qualified; (3) to have them each disinterested and impartial; (4) to have them each not of kin to either of the parties; (5) to have them each not personally dependents of either of the parties; (6) to have them each have their homes within the jurisdictional limits of the court; (7) to have them each drawn and selected by officers free from all bias in favor of or against either party; (8) to have them duly empaneled, under the direction of a competent court; (9) to have them each sworn to render a true verdict, according to the law and evidence given them; (10) to have them each hear the parties and their evidence; (11) to have given to them, and to have them receive, the instructions of the court relative to the law involved in the trial; (12) to have them deliberate, when necessary, apart from all extraneous influences; (13) to have them return their unanimous verdict upon the issues submitted to them. Opinion of the Justices, supra. The right of trial by jury was, by article VII. of the amendments of the constitution of the United States, "preserved," and continued in its integrity and unimpaired in the territory of Minnesota; and it existed there either by common law, or by statutes which were mere enactments of existing provisions of the common law, until the time of the adoption of the state constitution, "in suits at common law, where the amount in controversy exceeded twenty dollars." Whallon v. Bancroft, supra; St. Paul & S. C. Ry. Co. v. Gardner, 19 Minn. 132. The essential elements of the right of trial by jury were enacted by the legislature of the territory as follows: (1) The right to a body of twelve men for the trial of a cause. Rev. St. 1851, c. 126, § 160; (2) the right to have them each lawful, upright and well qualified. Rev. St. 1851, c. 126, §§ 148, 159; Id. c. 115, §§ 3, 4, 14, 15; Id. c. 8, §§ 15, 16, 17; (3) the right to have them each disinterested and impartial. Rev. St. 1851, c. 126, § 148; Id. c. 115, § 15, par. 6; Id. c. 128; (4) the right to have them each have their homes within the jurisdictional limits of the court; (5) the right to have them drawn and selected by officers free from all bias in favor of or against either party. Rev. St. 1851, c. 8, art. 1, §§ 15, 16, 17; Id. c. 126, § 146; (6) the right to have them duly empaneled under the direction of a competent court; to have them each sworn to render a true verdict according to the law and evidence given them; to have them each hear the parties

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and their evidence; to have given to them, and to have them receive, the instructions of the court relative to the law involved in the trial; to have them deliberate, when necessary, apart from all extraneous influences; to have them return their unanimous verdict. Rev. St. 1851, c. 71, §§ 14–39; Id. c. 126, § 160.

But the right of trial by jury according to the course of the common law and the law granting that right must be distinguished from all rights granted by the law, and from the law itself, which enforces and regulates the enjoyment of the right of trial by jury. The rules of procedure for enforcing and regulating the right of trial by jury, so far as they had been made statutory when the constitution was adopted, are found in Rev. St. 1851, cc. 8, 71, 115, 126 and 128. Only those relied on by plaintiff need be considered, viz.: Rev. St. 1851, c. 8, art. 1, §§ 15, 16; Id. c. 126, §§ 146, 149, 151, 153, 155, 160; Id. c. 115, §§ 1, 5, 6. These provisions declare: (1) From what list the names of men required to do jury work shall be selected; (2) the number of persons to be selected yearly from the poll lists for jury service; (3) who shall select this list; (4) when they shall select this list; (5) what they shall do with the list of names selected; (6) what number of men whose names are on this list shall, at any term of the district court, be summoned before it to do jury work; (7) the citizenship of the men composing a petit or trial jury; (8) who shall select the names of the petit jury; (9) the manner of choosing the names of the men composing the petit or trial jury from the list; (10) the manner of choosing the jury of twelve. These provisions prescribe, and were intended to prescribe, simply a mode, or method, of enforcing the right of trial by jury. The effect of the constitutional provision, as interpreted by this court, is "to recognize," "to continue unimpaired and inviolate," the essential elements of the right, the primary rights, of trial by jury as above described, but not to "recognize," "to continue unimpaired and inviolate," the remedial rights defined in the territorial statutory provisions or rules of procedure, above referred to, for enforcing such primary rights. Mathews v. Tripp, 12 R. I. 256; Beers v. Beers, 4 Conn. 535; Perry v. State, 9 Wis. 15; Stokes v. People, 53 N. Y. 164; Cole v. Perry, 6 Cow. 584; In re Petition of Wells, 3 Woods, 128, Fed. Cas. No. 17,386; People v. Harding, 53 Mich. 48, 18 N. W. 555; People v. Reilly, 53 Mich. 260, 18 N. W. 849; Jones v. Robbins, 8 Gray, 329; Work v. State, 2 Oh. St. 297;

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People v. Powell, 87 Cal. 348, 25 Pac. 481; Thompson & Merriam, Juries, 6, note 1; Flint River S. Co. v. Roberts, 48 Am. Dec. 185, note. See Black, Const. Prohib. §§ 141, 192, 218. The argument is supported by the course of legislation since the adoption of the constitution. In important particulars provisions of Rev. St. 1851, for enforcing or securing the right of trial by jury, have been changed, added to, and in many instances done away with. Rev. St. 1851, c. 8, §§ 15, 16; G. S. 1894, § 673; G. S. 1866, c. 8, tit. 3, § 98; Laws 1877, c. 10, § 1; Laws 1878, c. 18, § 1; G. S. 1878, c. 8, § 107; Laws 1885, c. 5; G. S. 1894, § 676; G. S. 1866, c. 8, tit. 3, § 100; G. S. 1878, c. 8, § 109; G. S. 1894, §§ 5611–5620; Sp. Laws, 1885, c. 294, § 1; Sp. Laws 1887, c. 97, § 1; 2 G. S. 1878, c. 71, § 14a; Sp. Laws 1889, c. 137, § 1; G. S. 1894, §§ 5621–5633; Rev. St. 1851, c. 126, § 146; G. S. 1894, § 5597; G. S. 1866, c. 71, § 1; G. S. 1878, c. 71, § 1; Rev. St. 1851, c. 126, § 160; Id., c. 115, §§ 1, 5, 6; G. S. 1894, § 561; Sp. Laws 1885, c. 294, § 4; 2 G. S. 1878, c. 71, § 14d.

Laws 1895, c. 328, does not contravene any of the essential elements of the right of trial by jury. The provision that each party shall strike alternately until each has struck 12, creates an element of fortuity, is an aid in securing impartiality, and takes the place of a right of peremptory challenge. Branch v. Dawson, 36 Minn. 193, 30 N. W. 545; Blanchard v. Brown, 1 Wall., Jr., 309, Fed. Cas. No. 1,507; Watson v. St. P. City Ry. Co., 42 Minn. 46, 43 N. W. 904; May v. Hoover, 112 Ind. 455, 14 N. E. 472. Immemorial usage and the rules of the common law provided for empaneling a struck jury, similar in character to the one provided by this act. 3 Blackst. Com. 358; Anonymous, 1 Salk. 405; Sparrow v. Turner, 2 Wils. 366; King v. Perry, 5 Term R. 453. The legislature may regulate the manner of trial by jury, or may prescribe new modes by reasonable regulations. Curtis v. Gill, 34 Conn. 54; Richards v. Hintrager, 45 Iowa, 253; Garrison v. Hollins, 2 Lea, 684; People v. Hoffman, 3 Mich. 248; Randall v. Kehlor, 60 Me. 37; Foster v. Morse, 132 Mass. 354; Dortic v. Lockwood, 61 Ga. 293; Mathews v. Tripp, supra; Beers v. Beers, supra. The constitutionality of laws in this state was never questioned. O'Brien v. City of Minneapolis, 22 Minn. 378; Mark v. St. P., M. & M. Ry. Co., 32 Minn. 208, 20 N. W. 131; Branch v. Dawson, supra; Watson v. St. P. City Ry. Co., supra; Bennett v. Syndicate Ins. Co., 43 Minn. 45, 44 N. W. 794. See Carson v. Smith, 5 Minn. 58 (79). Nor has

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the constitutionality of similar laws in other states been questioned. 3 Williams, Rev. St. Ohio, §§ 5185, 5186; Code Ga. 1873, §§ 5124, 5125; Code Ala. 1880, § 3018; Rev. St. Ind. 1881, §§ 525–527; 2 Sanborn & B. St. Wis. § 2544; 1 Rev. St. Mo. 1879, § 2802; Vierling v. Brewing Co., 15 Mo. App. 125; 2 Rev. St. Ind. 1876, c. 4, § 3; Pierce v. State, 67 Ind. 354.

The act is not in conflict with Const. art. 1, § 8. Adams v. Corriston, 7 Minn. 365 (456); Venine v. Archibald, 3 Colo. 163; Conners v. Burlington, C. R. & N. Ry. Co., 74 Iowa, 383, 37 N. W. 966; Randall v. Kehlor, 60 Me. 44; Beers v. Beers, supra.

MITCHELL, J. The only question presented by this appeal is the constitutionality of Laws 1895, c. 328, entitled "An act to provide for struck juries," etc. This was merely a re-enactment of Laws 1864, c. 31 (G. S. 1878, c. 71, §§ 15–19), which had been repealed by Laws 1891, c. 84.

The essential provisions of the act are as follows: Whenever a struck jury is deemed necessary by either party for the trial of the issue in any action in the district court, he may file with the clerk of the court a demand in writing for such a jury; whereupon the clerk shall forthwith deliver a certified copy of such demand to the sheriff, who shall give both parties four days' notice of the time of striking the same. At the time designated, the sheriff shall attend at his office, and in the presence of the parties or their attorneys, or such of them as attend, shall select, from the number of persons qualified to act as jurors in the county, 40 such persons as he shall think most indifferent between the parties, and best qualified to try such issue; and then the party requiring such jury shall first strike off one of the names, and the opposite party another, and so on alternately until each has struck off 12. If either party shall not attend in person or by attorney, the sheriff shall strike off for him. When each party has thus struck off 12 names, the sheriff shall make a copy of the remaining 16 names, and certify the same to be the list of jurors struck for the trial of the cause, and deliver the same to the clerk of the court, who shall thereupon issue and deliver to the sheriff a venire with the names in said list annexed thereto; and thereupon the sheriff shall summon the persons named according to the command of the writ. Upon the trial of the cause, the jury

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so struck shall be called as they stand on the panel, and the first 12 of them who shall appear, and are not challenged for cause or set aside by the court, shall constitute the jury, provided that, if enough do not appear for the trial of the cause, the court shall cause talesmen to be called, as in other cases. The act provides, however, that if the sheriff is interested in the cause, or is related to either of the parties, or does not stand indifferent between them, the judge may name some judicious and disinterested person to strike the jury, and perform all things required to be done in the premises by the sheriff. The jury must be struck at least six days, and the venire served at least three days, previous to the term of court at which the action is to be tried. The party demanding the struck jury is required to pay the fees for striking the same, and the mileage and per diem of the jurors, and shall not have any allowance therefor in the taxation of costs. The provisions of the act do not extend to the trial of any indictment for any offense where the defendant is entitled to two or more peremptory challenges.

The grounds upon which it is claimed that this act is unconstitutional are (1) that it is in conflict with section 4 of the bill of rights of the constitution,[4] which provides that "the right of trial by jury shall remain inviolate"; (2) that it is in conflict with the provisions of section 8 of the bill of rights, that "every person * * * ought to obtain justice freely and without purchase"; (3) that it is class legislation, and unequal in its operation, and therefore obnoxious to the spirit of the constitution; (4) that it is against public policy, contrary to the American system of jury trial, and liable to become "an engine of oppression and a vehicle for the corruption of justice."

Inasmuch as the legislature is a co-ordinate branch of the government, the courts do not sit to review or revise their legislative action; and hence, if they hold an act invalid, it must be because the legislature has failed to keep within its constitutional limits. A court has no right to declare an act invalid solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guarantied or protected by the constitution. Except where the constitution has

[4] Const. art. 1.

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imposed limits upon the legislative power, it must be considered as practically absolute. The courts are not the guardians of the rights of the people, except as these rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against, and remedy for, unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the people themselves, or their legislative representatives. Neither are courts at liberty to declare an act void merely because, in their judgment, it is opposed to the spirit of the constitution. They must be able to point out the specific provision of the constitution, either expressed or clearly implied from what is expressed, which the act violates. Moreover, courts will never declare a statute invalid unless its invalidity is, in their judgment, placed beyond reasonable doubt. Cooley, Const. Lim. c. 7.

In view of these principles, which are elementary, counsel's third and fourth objections present considerations which should mainly, if not entirely, be addressed to the legislature. They involve nothing of judicial cognizance, unless it be the question whether the provisions of the act are what, in a constitutional sense, is known as "class legislation." The act, however, is not obnoxious to that objection. Its provisions apply alike to all litigants. The right to avail himself of them on the same terms is open to every one. It is true that it is not every litigant that may be financially able to avail himself of that right. That is a consideration that may go to the fairness or justice of the law, but not to its constitutionality. There are a great many laws of whose privileges many persons, because of their financial condition, are unable to avail themselves; but it was never heard that this fact alone rendered an act obnoxious to the constitution, as being class legislation.

Neither is there any merit in the point that the act is in violation of the constitutional provision that every one "ought to obtain justice freely and without purchase." This is as old as Magna Charta, and has a well-understood historical meaning. It was aimed against the corrupt practice of taking bribes and exacting illegal fees in the administration of justice, and never meant that a litigant should have the right to conduct his suit in court without cost. At common law, every suitor bought his writ, and had to pay the cost of every ministerial act done at his request as the cause proceeded.

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Costs and fees imposed on suitors to defray the expenses of courts might be made so great as to be unreasonable, and to result in a practical denial of justice, and for that reason be unconstitutional. Where the limit is we need not now inquire, for the party who demands a struck jury cannot complain, for he voluntarily incurs the expense, and the opposite party has no ground for complaint, because it costs him nothing, and cannot be taxed against him as costs, even if he proves to be the losing party.

Therefore, the only remaining question is, does the act under consideration violate the provision of the constitution that "the right of trial by jury shall remain inviolate"?

What is "trial by jury" to which the constitution refers? The constitution nowhere defines it. The question is an historical one, for an answer to which reference must be had to "jury trial" as known at common law and as it existed in the territory of Minnesota at the time of the adoption of the constitution. From Whallon v. Bancroft, 4 Minn. 70 (109), down to its latest utterance on the subject, this court has always held that the effect of this clause in the constitution is—First, to recognize the right of trial by jury as it then existed in the territory; and, second, to continue such right unimpaired and inviolate. In all former cases the question was, in what cases are parties entitled to a trial by jury? And the answer has always been, in those cases in which they were entitled to jury trial by the laws of the territory at the time of the adoption of the constitution.

The question in the present case is, what is a trial by jury, within the meaning of the constitution? The expression "trial by jury" is as old as Magna Charta, and has obtained a definite historical meaning, which is well understood by all English-speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning.

The essential and substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity. The jury must consist of 12; they must be impartial and indifferent between the parties; and their verdict must be unanimous. It cannot be claimed that the act under consideration affects either the first or third of these essential attributes of a jury trial. If it affects

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any of them, it must be the second, viz. impartiality. The mode of selecting the jury is only a means to an end, and only goes to the question of impartiality. No court ever held or intimated that, in order to preserve the right of trial by jury "inviolate," it is necessary to continue the particular method of selecting jurors in force at the time of the adoption of the constitution. On the contrary, it has always been held that the method of selection is entirely within the control of the legislature, provided only that the fundamental requisite of impartiality is not violated. Perry v. State, 9 Wis. 19; Proffatt, Jury, § 106. No case is cited, and we think none can be found, to the contrary. Our own legislation, general and special, enacted since the adoption of the constitution, changing the mode of selecting jurors, is a witness to the correctness of this proposition; and, if the mode adopted provides for the selection of the jury with substantial fairness, a court would have no right to declare the act unconstitutional merely because, in its judgment, some other method would be better calculated to secure impartiality, at least when the mode adopted was one previously known to and recognized by law as a proper mode of selecting a jury.

The objections urged by counsel to the mode of selecting jurors provided by the struck-jury act are—First, that it eliminates the element of lot or fortuity; and, second, that it deprives the party of the right of peremptory challenge.

As already suggested, these are not essential or substantive elements of a jury trial, but merely means of securing one of those elements, viz. impartiality. Fortuity in the selection of a jury was unknown at common law, the panel being selected by the sheriff from his list of freeholders; and it was not until 3 Geo. II.[5] that he was required to select a panel for the trial of all causes at the assizes, instead of, as previously, a separate panel for the trial of each separate case. This mode of selection was subject to the objection that it opened the door for jury-packing by the sheriff. Hence most of the American states have long since taken the selection of jury lists out of the hands of the sheriff, and placed it in the hands of other officers or bodies, such as the selectmen of the towns, town supervisors, county commissioners, county courts, or certain officers con-

[5] C. 25.

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stituted a board for that purpose; and, as an additional means of insuring impartiality, they have introduced an element of lot in selecting from the jury lists those who should constitute the panel for the term, and, again, in selecting from this panel those who should compose the jury for the trial of a particular cause. It is likewise true that most of the American states have, as an additional means of securing impartiality, permitted a limited number of peremptory challenges in civil causes, the object of which, doubtless, was to give a party an opportunity to strike off a juror whom he suspected of prejudice, but without being able to give sufficient reasons for his exclusion for cause. The right of peremptory challenge in civil causes was unknown to the common law, and does not exist in England even at the present day. But it will be found that even under these modern statutes there is no element of fortuity in selecting the original jury list, but only in subsequent selections from that list; also, that if, by reason of challenge or otherwise, there is not a sufficient number of jurors for the trial of a cause, the court has the power to direct the sheriff to summon bystanders, or to issue to the sheriff a special venire, directing him to return an additional number of jurors from the body of the county; also, that in courts, such as justices' courts, where a jury is only wanted occasionally and at irregular intervals, it has usually been provided that the jury should be selected substantially in the manner provided in our struck-jury act, which involves no element of fortuity, and when there is no right of peremptory challenge eo nomine. This is, and at the date of the adoption of the constitution was, the mode of selecting a jury in justice's court in Minnesota. It was the mode prescribed for selecting a jury in the county court by the act under consideration in Perry v. State, supra.[6]

Special or struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained. As early as 8 Wm. III. a rule as to the manner of striking such a jury provided that if one party came, and the other did not, "he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve for him that is absent." Anonymous, 1 Salk. 405. See, also, King v. Edmonds, 4 Barn. & Ald. 471.

[6] Priv. Laws 1858 (Wisconsin) c. 7.

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The main object of special juries was protection against packed or incompetent common juries. Blackstone states the mode of procedure for selecting a special jury as follows: "Upon motion in court and a rule granted thereupon [the sheriff is required] to attend the prothonotary or other proper officer with his freeholders' book, and the officer is to take indifferently forty-eight of the principal freeholders, in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel." 3 Bl. Comm. 357. This, it may be suggested, is the model after which all the American special or struck jury acts have been framed. Indeed, it would perhaps be more accurate to say that these statutes are merely declaratory or amendatory of the common law on the subject; and, as respects the mode of selecting a special jury, the essential feature of all of them is that a list (generally from 40 to 48) of persons qualified to serve as jurors is selected from the body of the county by some officer who is impartial between the parties, and from this list the parties alternatively strike off a name, until the list is reduced to a specified number, and the jury for the trial of the cause is taken from such of the remainder as are not challenged for cause. It will be observed that the element of lot and the right of peremptory challenge were entirely wanting at common law in the selection of a special jury. It will also be found that the same is true of all the American statutes, except that in New York and Pennsylvania it seems that, under comparatively recent statutes, a limited right of peremptory challenge is given.

We regret that time has not permitted us to make anything like a complete examination of the legislation in this country on the subject of special or struck juries. We have found nothing on the subject in the New England states, but the Middle and Southern states seem generally to have recognized special juries as an existing common-law institution, and to have commenced to regulate it by statute at an early day. Thus, in 1801, New York enacted (Laws 1801, c. 98, § 22) that "no struck jury shall be allowed unless on the order of the court when they may deem it necessary by reason of the importance or intricacy of the case," which is evidently intended to be restrictive of an existing and well-known common-law right. This statute was amended in 1829, and again in 1857, so that it now reads: "Where it appears to the court that a fair and impartial trial * * * can-

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not be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order," etc. 2 Rev. St. 1829, pt. 3, c. 7, tit. 4, art. 3; 2 Bliss' Code 1890, § 1063. Delaware has had a statute providing for special juries at least since 1852 (Rev. Code 1852, c. 109, § 16); Pennsylvania, since 1785 (1 Pepper & Lewis' Dig. 2517). In the latter state, however, under what they call a common law of their own, no special venire is issued, but the jury is struck from the general venire issued for the term. McDermott v. Hoffman, 70 Pa. St. 31. In Maryland all juries seem to be, in a modified form, "struck." They select a list of 20 from the panel, and each party strikes four names from the list, and the remaining twelve constitute the jury. Code 1860, art. 50, § 7; Code 1878, art. 62, § 12. Virginia has had a statute, at least since 1849, authorizing the court, except in cases of felony, to allow a special jury; but in that state 18 out of a list or panel of 24 are chosen by lot, and the parties strike from the 18 until it is reduced to 12, who constitute the jury. Code 1849, c. 162, § 8; Code 1860, c. 162, § 25. In Georgia the statutes have provided for struck juries ever since 1799. The peculiarity in that state is that the grand jury list is taken as the list from which the parties strike off names. Acts 1869, No. 127, § 6; Code 1882, § 3925; Winter v. Muscogee R. Co., 11 Ga. 438; Walker v. Bivins, 57 Ga. 322. The statutes of Alabama have provided for struck juries at least since 1852 (Code 1852, § 2264; Code 1876, § 3018); also of Arkansas, as early as 1837 (Rev. St. 1837, c. 85, § 18); also Missouri, at least since 1872 (Wag. St. 1872, c. 80, § 23; Rev. St. 1879, § 2802).

Turning now to the states formed out of the Northwestern territory, of which Minnesota was a part, we find that, as early as 1824, Ohio passed an act providing for struck juries, which, as re-enacted in 1831 and amended in 1853, is identical with that of Minnesota. St. 1841, c. 64, § 22; Swan's Rev. St. 1854, c. 62, § 30; Rev. St. 1880, § 5185. Indiana has had statutes on the same subject at least since 1861 (Acts 1861, c. 22; 2 Gavin & H. St. Ind. 1862, pt. 2, c. 1, § 310; Laws 1881, c. 38, § 359; Rev. St. 1881, § 525; Rev. St. 1894, § 534); also Michigan, since 1827 (2 Terr. Laws, p. 471, § 16; Rev. St. 1838, pt. 3, tit. 2, c. 5, § 19; How. Ann. St. 1882, § 7585). As both Wisconsin and Minnesota were originally part of Michigan, it would seem that the struck-jury act of that state continued to be the law of Wisconsin until the latter state passed another act on the subject,

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in 1889, and continued to be the law of Minnesota until the adoption of the Revised Statutes, in 1851. Wisconsin passed a struck-jury act in 1889, which is substantially the same as that of Minnesota. Laws 1889, c. 268 (2 Sanb. & B. Ann. St. § 2544s).

Under all of these statutes, except where we have mentioned the differences, the method of selecting the jury was, in all essential particulars, the same as under our statute, and as at common law in England. Most, if not all, of these statutes, were enacted in the several states after the adoption of their constitutions, containing the same or similar provisions as to the right of trial by jury which are contained in the constitution of Minnesota; and yet, until in the present case, the constitutionality of these statutes has never, so far as we can discover, been even questioned, except once in Missouri, when the constitutional objections to the act were very promptly overruled. Vierling v. Stifel Brewing Co., 15 Mo. App. 125. The courts and the bar everywhere seem to have assumed that the constitutionality of such laws was beyond question. This act was first passed in 1864, less than seven years after the adoption of the constitution, and remained on our statute books unchallenged for twenty-seven years. Struck or special juries, and the present mode of selecting them, had been known to and recognized by the law, as being in accordance with the common-law right of trial by jury, for ages before the adoption of the constitution of this state. It is rather late in the day to discover the unconstitutionality of such acts; and it would certainly require great temerity for courts now to assume to have discovered some new ground on which to hold them invalid.

But, even if the question was one of first impression, we do not see why the act does not provide a method of selection sufficient to secure substantial impartiality. If the sheriff does not stand impartial between the parties, the judge may (shall) appoint some judicious and disinterested party to make the list; and, if a showing was made that furnished any reasonable ground for believing that the sheriff was not entirely impartial, it would be error for the court to refuse to appoint some one else to act in his stead. Moreover, if the sheriff selected a partial or unfair list,—as, for example, largely of the personal friends or neighbors of one of the parties, or persons who, from business interests, were presumably biased in favor of one side of the issue to be tried,—we have no doubt of the power, as well as duty,

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of the court to set aside the list, on motion analogous to the old motion to quash the array. If the list is honestly selected, it would seem that, under the right to strike off 12, it could be purged not only of all that could be successfully challenged for cause, but also of all even suspected of bias. But, if not, the party has at least six days after this, and before trial, in which to investigate the remainder, and his right of challenge for cause at the trial is still unlimited. Counsel has much to say about abuses that have grown up by reason of collusion between dishonest litigants and friendly or corrupt sheriffs; but, if such abuses have grown up, this is an argument to address to the legislature, rather than to the courts. All laws are subject to be abused by corrupt and dishonest men.

The most serious objection to the policy of the law (although not urged by counsel as of itself any ground for holding the law unconstitutional) is that it gives a party an absolute right to a struck jury without cause shown. But, whatever may be said of the propriety or policy of this feature of the act, we cannot see how it infringes upon the constitutional right of trial by jury, provided the act still leaves an impartial jury between the parties. If this is a valid objection to the constitutionality of the act, it would obtain against many of the struck-jury laws in other states; and yet we have not been able to discover that such an objection was ever even suggested. At common law, while an order and rule of court were required, yet the rule for a struck jury was made as of course on the motion of the party, and without any cause shown; and we do not discover that this was ever changed by statute in England, at least prior to the American Revolution. The first statute in that country on the subject of struck juries appears to have been 3 Geo. II. c. 25. That act was passed to remove a doubt that had arisen as to the power of the courts of law at Westminster on a matter not here material; but the language of the act is: "The said courts are hereby respectively authorized and required upon motion as aforesaid in any of the cases before mentioned to order and appoint a jury to be struck," etc. Section 2, c. 37, 6 Geo. II., was in the nature of a special act for the counties palatine of Chester, Lancaster, and Durham, authorizing the justices of the session or assizes in those counties, in their discretion, to order and appoint a jury to be struck. Chapter 18, 24 Geo. II., requiring a party calling a struck jury to pay the jurors' fees, as

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well as the cost of striking the jury, and providing that he should not be entitled to any more costs than if the case had been tried by a common jury, was intended to prevent parties from calling struck juries unnecessarily in small and trivial cases, and indicates that a party had a right to such a jury as of course, and not merely in the discretion of the court, or upon cause shown. In this country a number of the states have by statute restricted this common-law right to a struck jury, and provided that such a jury should be allowed only in the discretion of the court or upon certain cause shown. This was, and still is, the law in New York, Michigan, and a number of other states. But in Delaware, Pennsylvania, Georgia (until 1869), Alabama, Ohio (since 1853), Indiana (at least since 1861), Missouri (since 1879), and Wisconsin (since 1889), a party is or was entitled to demand a struck jury as a matter of right without showing any cause. In Pennsylvania, in 1789, in order to prevent defendants from calling for special juries merely for delay, it was provided that, except in cases involving the title to real estate, no rule for such a jury should be entered on the defendant's application, unless he filed an affidavit that he believed that there was a just and legal defense to the plaintiff's demand. Dunl. Laws Pa. 1700–1849, c. 95.

In view of such a consensus of opinion on the part of the legislatures, and impliedly of the courts and bar, of the country, that statutes of this kind do not impair the common-law right of trial by jury as known and understood in American constitutional law, we would not be warranted in holding this act unconstitutional. With the policy of the law we have nothing to do. If conditions have so changed that it results in abuses such as counsel suggest, the remedy is with the legislature.

Judgment affirmed.

CANTY, J. (dissenting). I cannot concur in the foregoing opinion. At the time of the adoption of our constitution, no man had a right in the territory of Minnesota to resort to the one-man method of having a jury selected for him, when he showed no shadow of cause for it, and when there were plenty of presumptively fair and competent jurors in court on the regular panel. No man ever had such a right in the territory. And, further, for more than 150 years prior to the adoption of our constitution, such one-man power in the selec-

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tion of juries had been almost universally discarded in all the American colonies, states, and territories east of Minnesota, through which we trace our customs and traditions. It is true, as I will hereafter show, that there were a few of these states which retained a form of struck-jury practice, under which the party might apply to the court for a jury struck, and the court, in its discretion, could grant or refuse the application. But, under the watchful discretion of the court, this was not in fact a one-man power in the selection of juries, and was not at all as likely to result in the selection of unfair juries as the absolute right of the party given by our statute to elect to have one certain man select the jury. For these reasons, I claim that, even if it is constitutional to allow such one-man power in this state at all, it is so only to the extent that it was practiced in the states aforesaid, and with as many safeguards thrown around it. I claim that, under our constitution, the party cannot be made the judge of his own cause as to when he will set aside the regular panel, and have this one-man power exercised for him; that the court, and not he, must be the judge of this, and, in its discretion, determine in each case whether or not the ends of justice will, under all the circumstances, be better subserved by allowing or denying a struck jury. But our present law attempts to vest practically the whole of this discretion in the party, and make him the judge of his own cause as to these matters. I claim that the removal of the safeguard of this watchful discretion of the judge leaves it less likely that an impartial jury will be selected, and therefore the law is unconstitutional.

The one-man power in the selection of jurors has always led to gross abuses. This is historical. But the opportunity for such abuse is much greater when the sheriff selects the jury for the particular case than when he selects a panel to try all the cases on the calendar. It is hardly necessary to cite authorities to show the evils of jury-packing which have resulted from the practice of allowing one man to select juries. "In this are pointed out two abuses, which have always weakened and undermined the integrity of the body [the jury], and against which we have had to make stringent and special provisions. These were the improper selection from the body of the people, and an unfair empaneling of those selected. * * * The English practice allowed the officer summoning a jury

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a large, and, as we think, a dangerous, degree of discretion as to the selection of the persons who formed the jury. This gave rise to the very common and grievous complaint, so frequently made in English judicial proceedings, of a packed jury, which, under the system there, was possible, and the evils and dangers of which have been so forcibly pointed out by writers, especially by Bentham in his Art of Packing Juries." Proffatt, Jury, § 114. "At common law no such thing was known as the preparation of a list of persons who were liable to be summoned to serve as jurors at a succeeding term of court; but the uncontrolled discretion was vested in the sheriff, in the coroner, or in officials called 'elisors,' of summoning such 'good and lawful men' as they might choose under the command of the writ of venire facias. This led to enormous abuses, chiefly in the packing of juries and the blackmailing of citizens, to remedy which American statutes have generally provided, with more or less particularity, for the preparation, a given time before the commencement of any term of court, or at other stated periods, of a list of persons, within the county or other jurisdiction, from whom jurors are to be summoned. The preparation of this list is generally, though not always, confined to officials other than the sheriff, such as the judges of general elections, or the county canvassers of the votes polled at general elections, the trustees of the township or the councilmen of wards, other town officers, special boards, county courts, or jury commissioners." 1 Thompson, Trials, § 13.

I will not multiply authorities on this point. We have no right to assume, as the majority do, that human nature is any better now than it always has been, or that the practically unrestricted exercise of this one-man power will produce a jury up to the standard of impartiality which existed when our constitution was adopted, and when no right to exercise this one-man power existed. The millennium has not come. The experience of ages shows that this one-man power has always led to abuse. Any increase in it, or any dispensing with the safeguards which should surround it, greatly detracts from the required standard of impartiality. In one breath the majority say that one of the requirements of a constitutional jury is impartiality, and in another breath they say that a law which so far fails to secure this impartiality as to be unjust and oppressive is still constitutional. In one breath they say: "The essential and

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substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity." In another breath they say: "A court has no right to declare an act invalid solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guarantied or protected by the constitution." For my part, I hope I shall never sit on a bench under such a constitution, when I have not got "temerity" enough to declare invalid a law for the selection of juries which is likely to result in "such injustice,"—which fosters the selection of juries so lacking in impartiality that the "provisions" of the law are "unjust and oppressive."

It is conceded by all parties to this case that impartiality is one of the constitutional requirements of a legal jury. In the exceedingly able brief filed on behalf of respondent by intervening counsel, the following are stated as three of the essential elements of a constitutional jury: "(2) The right to have them [the 12 men] each lawful, upright, and well qualified. (3) The right to have them each disinterested and impartial. * * * (7) The right to have them each drawn and selected by officers free from all bias in favor of or against either party." Neither can there be any doubt about the correctness of this proposition.

I also fully agree with the majority that the particular statutory machinery by which, at the date of our constitution, an impartial jury was secured, is not a part of the constitutional right to an impartial jury. It is the standard of impartiality which then existed that the constitution says shall remain inviolate, not merely the statutory machinery by which that standard was attained. It is the right to a certain grade of impartiality which the constitution preserves. What that grade is, is a historical or traditional question, not a statutory one. But the question has reference to the living customs and traditions of the people of Minnesota territory at the time the constitution was adopted, not to the dead customs and traditions of some prior time. But, to determine what that constitutional impartiality is, we can look backward over some length of time immediately prior to the date of the constitution, not solely to the statute law which existed at that date; and, by doing so, we will discover that the same

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standard of impartiality had existed for a considerable length of time. Then such statutory machinery did not provide the right itself, but merely the means of regulating and enforcing that right. It never was intended by the makers of our constitution to tie the hands of the legislature to the particular statutory mode of selecting a jury in force when the constitution was adopted. But it furnishes the standard of impartiality, and the legislature is not at liberty to go back and take as such standard the crude practices of the distant past, —practices which had been long discontinued.

As to the provision of the constitution that "the right of trial by jury shall remain inviolate," the majority say at one moment that the standard of impartiality which shall remain inviolate is that which existed in the Minnesota territory; and at the next moment they go back to the border of the Dark Ages to find that standard, and utterly ignore the fact that the world has moved in the meantime. If you can go back thus far why not go back still further, to the days when the standard of impartiality was such as was attained by the practice of deciding lawsuits by wager of battle? Why not take that as the standard of impartiality which prevailed in Minnesota territory and should prevail in the state to-day? It is hardly necessary to say that the safeguards which were thrown around the selection of a jury under the laws of the territory insured a standard of impartiality very much higher than did the English common law or the English statutes up to the time of the Revolution. The Revision of 1851 of the territory of Minnesota provided that the board of county commissioners should select from the poll lists a list of 72 persons for petit jurors (chapter 8, art. 1, §§ 15, 16); that the panel should be drawn by lot from this list (chapter 126, §§ 146–149; chapter 115, § 5); that the jury should be drawn by lot from this panel (chapter 71, §§ 14, 16; chapter 126, §§ 151–161); and the parties had the right both to challenge peremptorily and for cause (chapter 71, § 17; chapter 128). There never was in the territory of Minnesota any provision for a struck jury or any one-man power in the selection of jurors, except talesmen in case of deficiency and juries in justices' courts. As we shall hereafter see, safeguards securing as high, or nearly as high, a standard of impartiality, had long been in force in those states through which we obtained our laws, customs, and tra-

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ditions, and, while but few of these particular safeguards are a part of our constitutional right, the standard of impartiality thus attained is.

The majority dwell much on the statutes passed during the time of Geo. II., and the practice in England both before and after. But they fail to tell us that long prior to the time of Geo. II. the odious one-man power in the selection of juries had been abolished in most of the American colonies through which we trace our traditions. As early as 1692, the colony of Massachusetts Bay provided that the freeholders of each town should select the number of petit jurors apportioned by the clerk of the court to such town. 1 Acts & Resolves 1692–1714, p. 74, § 11. A similar provision was enacted in 1697 (Id. p. 286, § 10); and again in 1699 (Id. p. 368, § 4). As early as 1736 the panel of jurors was drawn by lot from lists similarly prepared by the selectmen of the town. 2 Acts & Resolves 1715–41, p. 828, c. 10. See, also, Id. p. 1090, c. 18; 3 Acts & Resolves 1742–56, p. 474, c. 5; Id. p. 995, c. 13; 4 Acts & Resolves 1757–68, p. 318, c. 29. See, also, 4 Laws of Mass. 1807–1816, p. 41; Rev. St. 1836, c. 95. The statutes of Vermont have always been similar. R. L. 1808, c. 6, § 58; R. L. 1824, c. 7, § 58; Rev. St. 1840, c. 13, §§ 71, 72; c. 32, §§ 2–6. So have the statutes of New Hampshire. Act June 17, 1785, found in Rev. Laws 1815, p. 121, §§ 1, 2; Rev. Laws 1830, tit. 100, §§ 1–5; Rev. St. 1842, c. 176, §§ 1–17. So have the statutes of Connecticut. Act Oct. 1744, found in Rev. Laws 1808, p. 426, §§ 1–5; Rev. Laws 1838, p. 51, §§ 36–40; Rev. St. 1849, tit. 1, c. 9, §§ 105–110. So, also, have the statutes of Rhode Island. Act of 1729, found in Pub. Laws 1798, p. 180, §§ 1–13; Rev. Laws, 1822, p. 136, §§ 1–14; Pub. Laws 1844, p. 154, §§ 1–10. And the statutes of Maine have always been similar. 1 Rev. Laws 1821, c. 84; Rev. Laws 1830, c. 84. So far as I can ascertain, there never has been in all New England, since the earliest settlements, anything resembling a struck jury or any one-man power in the selection of any jury, except in the selection of talesmen in case of deficiency.

We come now to states where the statutes provided for struck juries. But it will be observed that in none of these states, up to the time our constitution was adopted, could a struck jury be had as a matter of right, or without submitting the request for it to the watchful discretion of the judge; and in every instance the right to an impartial jury was much better guarded by the practice prescribed, and such

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practice was much less liable to abuse, and much more likely to attain impartiality, than the present struck-jury law of this state. In 1786 the legislature of New York enacted: "That it shall and may be lawful for the supreme court and the several inferior courts * * * upon motion * * * in any action * * * to order and appoint a jury to be struck for the trial thereof." 1 Greenleaf, Laws N. Y. p. 268, § 19. In 1801 the legislature of New York provided for the selection by the town supervisors and city assessors of jury lists (1 Laws 1801, c. 98, § 13); the drawing of the regular panel by lot from such list (section 11); and the drawing by lot of the jury from such panel (section 20). This statute also provided (section 22): "That no struck jury shall be allowed unless on the order of the court, when they shall deem it necessary by reason of the importance or intricacy of the case, and whenever they shall so deem it necessary" they may order such jury. See, also, 1 St. 1813, p. 333, § 22. 2 Rev. St. 1829, pt. 3, c. 7, tit. 4, art. 3, § 46, provides: "When it shall appear to the supreme court or to any court of common pleas * * * that a fair and impartial jury will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause." The statute is still in the same form. 1 Stovers' Code, N. Y. 1892, § 1063. Under these statutes, the New York courts have scrutinized very closely applications for struck juries, and have ordered them only in very exceptional cases: See Livingston v. Columbian Ins. Co., 2 Caines, 28; Manhattan Co. v. Lydic, Id. 380; Foot v. Croswell, 1 Caines, 498; Anonymous, 1 Johns. 314; Wright v. Columbian Ins. Co., 2 Johns. 211; Genet v. Mitchell, 4 Johns. 186; Poucher v. Livingston, 2 Wend. 296. In every one of these cases the court denied the application for a struck jury. Section 19 of the "Fundamental Constitutions" of the province of East New Jersey, passed in 1683, provides: "The manner of returning juries shall be thus: The names of all the freemen above five and twenty years of age, within the district or borough out of which the jury is to be returned, shall be written on equal pieces of parchment and put into a box, and then the number of the jury shall be drawn out by a child under ten years of age." See page 163, N. J. Grants, Concessions, etc., by Leaming & Spicer. In 1797 it was enacted: "That it shall and may be lawful for the supreme court, the courts of

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common pleas and the courts of general quarter-sessions of the peace respectively on motion * * * to order a jury to be struck." And, when the jury was ordered, the judge himself selected the names from the sheriff's list of all the qualified jurors in the county. R. L. 1821, p. 313, §§ 14, 15. See, also, Elmer's Dig. 1838, p. 268, §§ 14, 15. As stated by the majority, Pennsylvania, since 1785, has had a struck-jury law which provides that the names shall be chosen by lot from the general venire, or, as it is expressed in the statute, "from the proper wheel." Surely, there is no one-man power in this. In 1824 the legislature of Ohio enacted: "That it shall and may be lawful for the supreme court and courts of common pleas respectively on motion * * * to order a jury to be struck." Rev. Laws 1824, p. 99, § 19. See, also, Rev. Laws 1831, p. 99, § 21; St. 1841, c. 64. This statute was enacted in Michigan in 1827. 2 Terr. Laws Mich. p. 471, § 16; Id. p. 658, § 19; 3 Terr. Laws Mich. p. 1246, § 16. No struck-jury law was enacted in Wisconsin or Minnesota until after the adoption of our constitution.

I have now examined substantially all the statutes of all the states through which we trace our customs and traditions, from early colonial times up to a later time than the period during which we trace such customs and traditions; and, since the early periods of colonial history, I find practically nothing which permits the exercise of any such one-man power in the selection of juries as is permitted by our present struck-jury law. The territory of Michigan was organized, Wisconsin was carved off of Michigan, and Minnesota off of Wisconsin, before 1851, when Ohio changed her struck-jury law so as to give the party an absolute right to resort to one-man power in the selection of a jury; and no struck-jury law was passed in Indiana until 1861. Of all the states east of us through which we trace our customs and traditions, only New York, New Jersey, Ohio, and Michigan had a struck-jury law which permitted anything which had any semblance to one-man power in the selection of the jury. None of these laws allowed a struck jury as a matter of right. It was allowed only when the court or judge ordered it. This certainly had a great tendency to curb the abuses which would otherwise arise from the exercise of the one-man power in selecting the jury. In fact, it could hardly be called a one-man power at all under such circumstances. The judge would scrutinize closely the motives

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of the party applying for the struck jury, and deny the application if he had the least suspicion that the sheriff would not be perfectly fair in the selection of the jury. But under our statute a struck jury is a matter of right, and the one-man power in the selection of it practically absolute. There is no way of curbing the abuses which may arise, until they become so gross that the opposing party can successfully impeach the sheriff by an affirmative showing that he is not indifferent; mere suspicion is not enough.

Under the statutes of such other states above referred to, if an application to the court for a struck jury was opposed, it would hardly be granted as of course. The party applying for it would, at least, have to throw some suspicion on the regular panel, or on the intelligence, fairness, or impartiality of a considerable number of the regular jurors. But, conceding that he would not, the court would hardly grant the application if the least suspicion was thrown by the opposing party on the fairness or impartiality of the sheriff. As long as the presumption remained that the regular jurors were fair and impartial, no judge would require more than a suspicion to be thrown on the motives of the party applying for the struck jury, or on the impartiality of the sheriff. But now the motives of such party cannot be inquired into at all, and nothing but the strongest evidence will impeach the sheriff. The difference is neither slight nor fanciful, but the infringement on the right to an impartial jury is substantial. The change in the struck-jury law not only gives the moving party a struck jury as a matter of right, and without regard to the question of necessity or propriety, but it also shifts onto the opposing party the burden of showing the unfairness of the sheriff, or at least greatly increases such burden. If, for illustration, a statute gave the right to challenge a juror peremptorily, who would say that the party was not prejudiced by the denial of that right, as long as he still had the right to challenge for cause? Certainly no one. And yet in that case the party would have the right to examine the juror under oath as to his bias, and also to subpœna and produce other witnesses to prove that bias. But, when the sheriff is challenged for cause in such a case as this, he cannot be examined on oath, nor can any witnesses be subpœnaed and sworn to prove his bias, so as to have the court designate some one else to select the struck jury. The statute has changed the burden of proof

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as to facts, and under circumstances which make it exceedingly difficult for the opposing party to sustain that burden. The slightest innovation which increases the one-man power in the selection of juries, or puts that power beyond the absolute control of the court, should be held unconstitutional. But, as I have shown, the innovation here in question is not slight. Indeed, it is a notorious fact that the putting of the selection of struck juries practically beyond the control of the court too often results in a favored litigant selecting his own jury. The litigant who happens to own the sheriff has a special privilege, which I contend it is unconstitutional to give him. The most un-American custom that can be found in the most un-American state in the union is not, as the majority hold, the measure of our constitutional rights.

The question is not, as the majority seem to argue, whether you would sometimes or in some cases get as impartial a jury, or in fact the same jury, as you would if the court had a veto power on the demand for a struck jury, but whether you would at all times and under all circumstances be as likely to get as impartial a jury; and the majority do not pretend to say that you would. When a party has considerable litigation in the same court, and makes a practice of demanding struck juries, the judge presiding at the trials has the best opportunity in the world for observing whether such juries are being selected with the strictest impartiality; and no upright judge who had the power to deny a struck jury would allow it after he once commenced to suspect that the sheriff or some obscure deputy on whom such work was imposed was the mere tool of the party applying for such struck juries. Again, the sheriff would not be at all as likely to abuse his powers and select unfair juries when he knew he was being watched by a judge who could and would promptly deprive him of those powers if he did not act with strict impartiality. While admitting that the test of the constitutional right of trial by jury is the character of that right as enjoyed and practiced in the territory at the date of our constitution, yet the majority persist in making the mistake of going back to the English common law to determine the right which was so enjoyed and practiced in Minnesota territory. This is not a question of common law, but a question of what actually existed at a particular time. All the authorities agree on that point. But, even if it were

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a question of common law, it would be such common law as we had adopted and up to that time retained, not such as we had long prior thereto discarded. The common law is progressive, and this is especially true of it in its transition from England to America. In both countries statutes have often wiped out portions of the common law, which the repeal of those statutes long afterwards would never revive. See Bouvier, Law Dict. tit. "Common Law."

Neither can I agree with the majority that the right of challenge or something equivalent, which will produce a jury of as high standard of impartiality, is not a constitutional right. It is also, in a greater or less degree, an ancient right. Proff. Jury, § 147. But I do not think that this question is controlling on this case, as the opportunity to strike 12 jurors from the list might be a sufficient equivalent for the right of peremptory challenge, if there were other sufficient safeguards to maintain in other respects the required grade or standard of impartiality, which, in my opinion, there are not.

The fact is also noted by the majority that a one-man power has always been exercised in the selection of talesmen. That proves nothing. Neither the litigant nor the sheriff can ordinarily anticipate such a contingency in advance, so as to be prepared to take advantage of it; and no such litigant would attempt to procure the nomination and election of a sheriff, or charter him after he was elected, in anticipation of any such contingency. Besides, the practice adopted in the selection of talesmen is a matter of necessity, which is not true as to the practice adopted in the selection of struck juries.

Again, we are told that struck juries have always been selected in justice's court in a similar manner. That proves nothing. It is held under most constitutions that there is no right of trial by jury at all in the petty cases of which a justice has jurisdiction. Proff. Jury, § 99. Then, it is certainly competent to try such cases with a kind of jury which would not be in all respects a constitutional jury in the district court, if for no other reason, because it has always been so. The right of appeal is a most effectual remedy for abuse of the one-man power in the selection of a jury in justice's court.

For the reasons stated, I am of the opinion that our present struck-jury law is unconstitutional. The legislature have a perfect right to raise the grade of impartiality higher than it ever has been,—

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higher than it was either at the date of our constitution or at any time since. But they have no right to lower that grade below what it was when the constitution was adopted, by increasing the influence of either party in the selection of the jury. There is much room for the improvement of our jury system, but, under the guise of such improvement, it is not constitutional to open the door for giving a party the opportunity to select his own jury. It is undoubtedly true that many corporations are being plundered by the unjust verdicts of prejudiced juries,—juries blind even to the fact that the unjust tax thus imposed is, in turn, levied by these corporations on the general public, who, in the end, have to pay for most of this plundering. It cannot be questioned that there is a crying need for reform in the jury system, but it does not follow from this that these corporations should in their own cases be permitted to name the persons who should sit as jurors. In my opinion, the judgment appealed from should be reversed.

COLLINS, J. (dissenting). As stated in the majority opinion, the effect of that clause of our constitution which provides that "the right of trial by jury shall remain inviolate" is to recognize the right of trial by jury as it then existed, and to continue such right unimpaired and inviolate. It seems to be clear that the right to a struck jury never existed in the territory, and from the statutes of other states and territories from which we derive our traditions and customs concerning juries and the right of trial thereby, cited in the dissenting opinion, that only a qualified right to a struck jury ever existed in traditions of the territory. In any event, it did not exist absolutely. Possibly the qualified right to a struck jury was in existence where a showing was made to the court and an order obtained for the empaneling of such a jury. But in these cases the selection of the jury was more or less under the supervision of the court itself. In either case, if this was the situation when our constitution was adopted, I think it evident that the right of trial by jury as it existed in territorial days has been encroached upon and impaired by the 1895 statute, which grants to any litigant who has the money and the disposition the unqualified right to have his cause submitted to a specially selected jury.

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Nor am I willing to admit that this statute is not obnoxious to section 8 of the bill of rights. This clause does not guaranty to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice. Under the law in question, A., having an action against B., may deem it necessary to have a struck jury, and having the money with which to pay the expense, which may amount to a large sum, can obtain such a jury. But he is compelled to pay for it, in order that there may be a due administration of justice. He thus secures an extraordinary privilege, and is not obliged to rely for justice on a selection of the jury from the regular panel. Now, let us suppose that A. is satisfied with the regular panel, but that B. deems it necessary to have a struck jury, and is without money with which to meet the expense. Is he not denied that which his wealthy opponent is privileged to purchase? Can he obtain justice freely and without purchase, completely and without delay, when he is deprived of a specially selected and presumably specially qualified jury, which his adversary may deem it necessary to have, and may be able to obtain? Of course, these remarks are made with reference to my views as to the conditions existing when our fundamental law was adopted. Although the constitutional provision is as ancient as Magna Charta, its scope and meaning have changed, and kept pace with our institutions. The imposition of terms and costs of litigation, which were formerly, and are now, regarded in England as not opposed to this provision, would not be tolerated for a moment under our traditions and customs.

The enormous amount of business now before the court prevents further elaboration upon this feature of the case, and I drop it here, confident that it is not wholly without merit. I concur in the conclusion reached by Mr. Justice CANTY.

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JOSIAS N. ROGERS and Another v. FRANCIS V. HEYDERSTAEDT.[1]

June 19, 1896.

Nos. 10,036—(274).

City of St. Paul—Local Assessment—Collection.

Sp. Laws 1891, c. 12, § 5, does not require the city treasurer, when making his report to the district court, and demanding judgment for unpaid special assessments, to file the original assessment warrants in court.

Appeal by plaintiffs from a judgment of the district court for Ramsey county, adjudging the validity of a certificate of sale held by defendant, entered in pursuance of the findings and order of Brill, J. Affirmed.

S. L. Pierce, for appellants.

Edward J. Darragh and *Hermon W. Phillips*, for respondent.

MITCHELL, J. This action was brought to determine an adverse claim to real estate. The claim which the defendant set up in his answer was a certificate of sale under a judgment of the district court for an unpaid special assessment on the property by the board of public works of the city of St. Paul for grading a street.

The only objection urged by the plaintiffs to the proceedings which culminated in the judgment and subsequent sale is that the city treasurer, in his report pursuant to Sp. Laws 1891, c. 12, § 5,[2] did not file with his report, and as a part of it, the original warrant for the collection of the assessment. The language of the section is that "it shall be the duty of the city treasurer immediately after the expiration of the thirty days * * * to report to the district court * * * all assessment warrants for the collection of any assessments under the provisions of this chapter which have been delivered to him, and then and there ask for judgment against the several lots and parcels of land described in such warrants for the amounts of assessment," etc.

We are not prepared to concede, even if the statute required the original warrants to be filed in court, that the failure to do so would

[1] Reported in 68 N. W. 8.

[2] Municipal Code of St. Paul 1893, § 128.

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go to the jurisdiction of the court, or be anything more than an irregularity. But we are of the opinion that the statute neither requires nor contemplates that the warrants shall be filed with the court. The "report" of the city treasurer is in the nature of a complaint demanding judgment against the property for the amount of the assessment, and of course should state what warrants he has in his hands, describing them, and stating the amount of the assessments therein that are unpaid. As suggested by the trial judge, the original warrants can be produced in evidence in support of the demand for judgment. There would seem to be no good reason why the warrants themselves should be filed in court. If so filed, they would have to permanently remain there; and in case any one would want to pay an assessment after the treasurer had made his report, and before judgment, the city treasurer would have nothing in his hands to show his authority to collect.

Judgment affirmed.

STATE OF MINNESOTA v. WILLIAM F. HOLMES.[1]

June 19, 1896.

Nos. 10,048—(57).

Embezzlement—Indictment under G. S. § 7262—Evidence of Acts Previous to Time Alleged.

Under an indictment for statutory larceny or embezzlement in the general form authorized by G. S. 1894, § 7262, the state may prove any and all acts of embezzlement by the defendant in the same employment committed within six months next after the time stated in the indictment; and the defendant may be convicted of the whole. But, under such an indictment, evidence of acts of embezzlement committed prior to the time stated in the indictment is inadmissible as evidence of the substantive offense. It would only be admissible, if at all, for a collateral purpose; for example, showing the intent with which the acts relied on, as constituting the substantive offense, were committed.

Same—Indictment not under section 7262.

But section 7262 is permissive, and not mandatory; and if the state elects to waive its benefits, and to frame an indictment which is sufficient, and

[1] Reported in 68 N. W. 11.

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limit itself to evidence which is admissible, irrespective of the provisions of the section, the six-months limitation will not apply, and the indictment can be sustained by evidence of an act of embezzlement committed prior to the time stated therein.

Evidence—Good Character of Defendant—Charge.

The charge of the court as to the effect of evidence of defendant's good character *held* erroneous, because in effect instructing the jury that such evidence is only to be considered when the other evidence leaves a doubt in their minds of the defendant's guilt.

Failure of Defendant to Testify—Comment by County Attorney—G. S. 1894, § 5658.

A remark of the county attorney during his argument to the jury *held* to amount to an allusion to the fact that the defendant did not testify, which is prohibited by G. S. 1894, § 5658.

Appeal by defendant from an order of the district court for Wabasha county, Gould, J., denying a motion for a new trial. Reversed.

The eleventh assignment of error, referred to in the opinion, was as follows: "The court erred in instructing the jury as follows: 'And if his intent was to appropriate it to his own use, then he would be guilty, although he did not intend to defraud the bank.'"

H. D. Stocker, *F. M. Wilson*, *J. F. McGovern*, and *H. W. Morgan*, for appellant.

H. W. Childs, Attorney General, *George B. Edgerton*, and *John H. Mullen*, County Attorney, for respondent.

MITCHELL, J. The defendant was indicted, tried, and convicted of the crime of larceny (embezzlement), as defined by G. S. 1894, § 6709, subd. 2.

The indictment alleged that the defendant, on June 29, 1895, being the president of the Merchants Bank of Lake City, and, as such, having in his possession, custody, and control—

"A certain sum of money, to wit, nine thousand dollars, in lawful, current, and genuine money of the United States of America, then and there of the value of nine thousand dollars, a more particular description of which said money being to the grand jury unknown, and all of which said money and personal property was then and there the money and personal property of and belonging to said The Merchants Bank, * * * did, then and there wilfully, unlawfully, wrongfully, knowingly, and feloniously appropriate the money aforesaid, and the whole thereof, to his own use, with the intent then and there by him * * * to defraud," etc.

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Upon the trial, the state, against objection and exception, introduced, as proof of the substantive offense charged, evidence tending to show that on June 29, 1894, the defendant unlawfully and feloniously appropriated to his own use $5,000 of the money of the bank, which was in his custody and control as president of the bank. The manner in which the evidence tended to show that the act was committed was as follows: Defendant, having an open deposit account with the bank, but which was already overdrawn, drew his check for $5,000, payable to the bank, on another bank, at Casselton, North Dakota, in which he had no funds to meet it; placed it among the securities or cash items of the Merchants Bank of Lake City, where it was allowed to remain; charged the account of the Casselton bank with the amount, so as to make it appear that it owed the Lake City bank that amount; then he credited his own account with $5,000, as if he had deposited that amount; and then, on the same day, drew his checks on the Lake City bank, on which he drew out and appropriated to his own use the moneys of the bank to the full amount of this fictitious deposit of $5,000. It was on this transaction, as constituting the substantive offense charged, that defendant was convicted of larceny of $5,000.

1. The first point made by the defendant is that evidence of an act of embezzlement committed prior to the time stated in the indictment was inadmissible as evidence of the substantive offense charged, or, otherwise expressed, that the indictment could not be sustained by evidence of acts committed before the time stated. This contention is predicated upon the provisions of G. S. 1894, § 7262, which reads as follows:

"In any prosecution for the offense of embezzling the money, bank notes, checks, drafts, bills of exchange, or other security for money, of any person, by a clerk, agent or servant of such person, it shall be sufficient to allege generally in the indictment an embezzlement of money to a certain amount without specifying any particulars of such embezzlement, and on the trial evidence may be given of any such embezzlement committed within six months next after the time stated in the indictment; and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it is proved that any money, bank note, check, draft, bill of exchange, or other security for money, of such person, of whatever amount, was fraudulently embezzled by such clerk, agent or servant within the said period of six months."

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If the provisions of this section govern this case, their language would seem to be decisive in favor of defendant's contention. While statutes having the same general purpose are numerous, this particular one was enacted over 60 years ago, in Massachusetts,[2] whence it was borrowed by Michigan,[3] from which it was inherited by Wisconsin,[4] from which it was, in turn, inherited by Minnesota.[5] For its early history, see Commonwealth v. Wyman, 8 Metc. (Mass.) 247.

An element that enters into the definition of embezzlement is the fiduciary and confidential relation between the owner and the custodian of the property. This relation affords the amplest opportunity to misappropriate money, funds, and securities, and often presents great difficulty in proving exactly when and how it was done, or the precise description of the property misappropriated. Embezzlement in such cases very often consists of a series of acts running through a considerable period of time. These separate acts, and the amount and description of the property misappropriated at any one time, may not be susceptible of direct proof, while the aggregate result is. The body of the crime consists of this series of acts done by virtue of the fiduciary relation between the employer and the employé, all of which virtually constitute a continuing breach of trust. Prior to this statute, conviction was often difficult, if not impossible. Moreover, if the state was compelled to elect to rely on a single one of this series of acts as constituting the substantive offense, it would often be difficult to secure a conviction adequate to the offense actually committed, if the defendant, although embezzling thousands in the aggregate, had used the precaution to take only a small sum at any one time.

The statute was enacted to avoid these difficulties—First, by authorizing this general form of indictment; second, by permitting this liberality of proof as to the description of the property; and, third, by permitting a conviction of the aggregate amount embezzled by a series of acts from the same employer.

So far the provisions of the act operate in favor of the prosecution. But, under the common law and general statutory rule as to time, the state, unless otherwise limited, could prove a series of acts ex-

[2] Rev. St. 1836, c. 133, § 10.
[3] Rev. St. 1838, pt. 4, tit. 1, c. 11, § 10.
[4] Rev. St. 1849, c. 141, § 10.
[5] Rev. St. 1851, c. 109, § 10.

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tending as far back as the statute of limitations would permit, and down to the date of finding the indictment. This might work an injustice to the defendant. Hence, in view of the latitude in pleading and proof allowed the state, a limitation as to time was imposed for the protection of the defendant, viz. that proof of the substantive offense shall be limited to acts committed within six months next after the time stated in the indictment. This creates an exception to the general rule stated in section 7244, that:

"The precise time at which the offense was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense."

The case falls within the familiar rule of statutory construction that when a general intention is expressed in a statute, and the act also expresses a particular intention, incompatible with the general intention, the particular intention shall be considered an exception. However, the statute would not exclude evidence of acts committed outside of the six months for a collateral purpose, as, for example, showing the intent with which the acts within the six months were committed. This is the construction which has been put on this provision of the statute by the supreme courts of Michigan and Wisconsin. People v. Donald, 48 Mich. 491, 12 N. W. 669; State v. Cornhauser, 74 Wis. 42, 41 N. W. 959. While the supreme court of Massachusetts seems never to have passed upon the question, yet we are advised by the attorney general of that state that the same construction is universally accepted and acted upon in that jurisdiction.

It would seem from what is said in Commonwealth v. Bennett, 118 Mass. 443, that the ruling in that state, at least at nisi prius, is that, while evidence may be given of any and all acts committed within the six months, yet the defendant can only be convicted of one act of embezzlement, and that it is at least within the discretion of the court to compel the state to elect upon which act it will rely for conviction. In view of the language of the statute as well as the difficulties which it was intended to remove, we are unable to concur in this view. We think its manifest meaning is to allow, as proof of the substantive offense, evidence of all acts of embezzlement from the same employer committed within the six months next after the time stated, and the conviction of the defendant of the embez-

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zlement of the whole amount. See Ker v. People, 110 Ill. 627. Such a construction will fully effectuate the purpose of the statute, while it neither works any injustice to the defendant nor impairs his constitutional right[6] "to be informed of the nature and cause of the accusation" against him. He may always, if he desires, apply for a specification of the particular acts relied on by the state, as may be done in other cases where the offense is of a general nature, and the charge is in general terms. Commonwealth v. Bennett, supra.

But the question remains, do the provisions of section 7262 apply to this case? Irrespective of this section, the indictment is sufficient under section 6709, which creates and defines the crime of statutory larceny; and the evidence introduced by the state was admissible under the indictment, irrespective of the provisions of section 7262. In short, the state has not availed itself of the provisions of that section, either as to pleading or proof. Section 7262 is permissive, and not mandatory, in its terms, and was no part of the act (Penal Code of 1885) which created and defined the offense. We are therefore of opinion that, if the prosecution sees fit not to avail itself of the benefits of section 7262, it may do so, and frame its indictment, and introduce its evidence, under the general rule, irrespective of the provisions of that section, including the one as to time. If so, of course it could introduce evidence and secure conviction of only one act of embezzlement as constituting the substantive offense; evidence of other acts being in such case only admissible for the purpose of showing the intent with which the act relied on was committed. While the reasons for the decision are left rather obscure, yet this was all that was decided in State v. New, 22 Minn. 76, for in that case the indictment was good, and the evidence introduced admissible under it, irrespective of the provisions of section 7262. It is also worthy of notice that in People v. Donald, supra, Justice Cooley takes pains to state that the evidence in that case would not support the information as a common-law charge.

2. The defendant introduced evidence of his previous good character. In his charge, the court instructed the jury as follows:

"That [evidence of good character] is a legitimate subject for you to take into consideration, but it goes to this extent only: If an act which the law makes an offense has been actually committed, if you

[6] Const. art. 1, § 6.

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are satisfied beyond a reasonable doubt that the prohibited act was committed, it makes no difference what the character of the man is. It is not the subject of your investigation. But if the evidence should leave your minds in such a state that you cannot say that you are satisfied beyond a reasonable doubt, and if you find that the defendant has borne hitherto an unblemished character,—such a character as makes the act inconsistent with his history and standing,—that circumstance should turn the scale in his favor. At such a time the influence of a good character ought to weigh very strongly in behalf of a person accused."

We are unable to see it otherwise than that this instruction was erroneous, and subject to the same objection which was pointed out in State v. Sauer, 38 Minn. 438, 38 N. W. 355, viz. that evidence of good character is only to be considered when the other evidence leaves a reasonable doubt of defendant's guilt in the minds of the jury; in short, that it may be resorted to, to solve such a doubt, but not to establish it. The jury would naturally understand the charge in that way; and the general instructions in other parts of the charge to the effect that, in determining the guilt or innocence of the defendant, the jury should consider all the evidence in the case, did not remedy or neutralize the error.

3. Defendant did not testify as a witness in his own behalf. During his closing argument to the jury, the county attorney referred to the fact that the defendant had not called the cashier or assistant cashier of the bank, who were his nephews, and was thereupon interrupted by one of defendant's attorneys remarking: "God only knows where Charles H. Holmes is; we don't;" whereupon the county attorney, turning upon defendant's attorney with some warmth, remarked, in substance: "You know where the cashier is, and where he has been, and you know the laws of this state permitted the defendant to remain silent, and it would be improper and cowardly for me to comment upon it, and it is not my intention to evade the spirit or the letter of the law." To this remark defendant excepted.

G. S. 1894, § 5658, provides that a person charged with crime shall at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant; nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court. We are not particularly impressed with the wisdom of this last provision,

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for every intelligent juror knows that a defendant may testify in his own behalf, and, if he neglects or refuses to do so, every juror will draw his own inferences from the fact, unfavorable to the defendant. But the law is the declared legislative policy, and we are bound to assume that a violation of the statute is prejudicial error. The remark of the county attorney was probably made in the heat of argument, and elicited by the interruption by defendant's counsel; but it was, nevertheless, a clear violation of the law, and was none the less so because addressed rather to the counsel than to the jury, but in their presence and hearing. State v. Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

There are one or two statements in the court's charge, particularly that referred to in the eleventh assignment of error, which, if not positively erroneous, are at least calculated to mislead; but as this was doubtless the result of mere inadvertence, and is not likely to occur on another trial, it is unnecessary to consider them. Neither is it necessary to refer to any of the other assignments of error, except to say that, in our opinion, there was sufficient evidence to justify the jury in finding that the funds of the bank were in the possession, custody, or control of the defendant, within the meaning of the statute; also, that he appropriated the $5,000 to his own use, with criminal intent, within the statutory definition of the crime.

But, for the two errors already referred to, the order appealed from must be, and hereby is, reversed, and a new trial ordered.

AUGUST RICHTER v. MERCHANTS NATIONAL BANK OF ST. PAUL.[1]

June 19, 1896.

Nos. 10,082, 10,083—(168, 300).

Insolvency—Filing Claim—Appealable Order.

An order denying the petition of a creditor in insolvency proceedings to be permitted to file his claim for allowance with the assignee after the expiration of the time limited is appealable, but an order granting such petition is not appealable, as it can be reviewed on appeal from the judgment establishing the creditor's claim.

[1] Reported in 67 N. W. 995.

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Same—Discretion of Court.

The making of an order granting or refusing such petition is a matter of discretion with the trial court, and the order will not be set aside on appeal unless there was a clear abuse of such discretion. *Held*, further, that the trial court did not abuse its discretion in permitting the claimant herein to file his claim with the assignee after the time limited had expired.

In the matter of the assignment of Frank Nicolin, insolvent, the district court for Scott county, Cadwell, J., made an order granting the petition of August Richter, a creditor of the insolvent, for leave to present his claim to the assignee of the insolvent for allowance. From the allowance of the claim by the assignee The Merchants National Bank of St. Paul, a creditor of the insolvent, appealed to the district court, where judgment was entered in favor of Richter. From the order and from the judgment the bank appealed. Affirmed.

Davis, Kellogg & Severance, for appellant.

Peck & Hutton, for respondent.

START, C. J. The insolvent in this matter, on March 27, 1893, made an assignment for the benefit of his creditors under the insolvency laws of the state. On April 23, 1894, the district court made its order requiring that all claims against the estate of the insolvent be presented to the assignee on or before June 1, 1894, and further directed that notice of the order be given by publication and by mailing a copy thereof to each of the creditors of the insolvent known to the assignee. On August 12, 1895, the claimant herein presented his petition to the district court for leave to file his claim with the assignee for allowance. The court, upon a hearing of said petition, on notice to all parties interested, on September 16, 1895, made its order granting the petition, from which order the appellant, a creditor of the insolvent, appealed to this court. The assignee allowed the claimant's demand, and from such allowance the appellant appealed to the district court, where a trial was had, and judgment entered in favor of the claimant, establishing and allowing his claim in the sum of $10,055.45. From this judgment the appellant appealed to this court.

1. The respondent makes the point that the order permitting the claimant to file his claim with the assignee for allowance is not an

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appealable order. An order denying an application of a creditor to be permitted to file his claim with the assignee for allowance after the expiration of the time limited for the filing of claims by creditors is an appealable one. It is final, and puts an end to any further proceedings; and, if the making of the order is an abuse of discretion, the only way to review it is by an appeal from it. But an order granting such leave is not appealable, for it is not final. The claim may never be allowed, and, if it is allowed by the final judgment of the court, and the making of the order was an abuse of discretion, it may be reviewed by an appeal from the judgment. The petition, order, trial, and judgment are all parts of one case or proceeding, —that is, the insolvency proceeding,—and by means of a bill of exceptions or settled case, containing a record of the proceedings of the court with reference to the making of the order, it may be reviewed on an appeal from the judgment.

2. The practical administration of our insolvency law in many particulars is committed very largely to the discretion of the district courts of the state. Especially is this true as to the marshaling of the assets of the insolvent, and ascertaining the creditors and the amount of their claims. The making of an order of the district court granting or refusing a creditor leave to present his claim to the assignee for allowance after the expiration of the time limited for so doing is a matter of discretion on the part of the court, and it will not be set aside on appeal to this court, unless there was a clear abuse of such discretion in making it.

On the merits the only question presented by these appeals is whether the making of the order in question was an abuse of discretion on the part of the trial court. We are of the opinion that it was not. No question is here made, or was in the court below, as to the bona fides of the appellant's demand. It is admitted to be an honest claim. Nor is it claimed that the appellant or any other creditor is prejudiced by the allowance of this claim, except that it increases the liabilities of the estate, whereby the dividend to creditors will be in some measure reduced. It is also apparent from the record that the making of the order in no manner delayed the settlement of the estate, as no dividends had been made, and a large part of the assets remained to be converted into money at the time the order was made. The claimant's excuse for not sooner present-

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ing his claim is that he had no notice of the order which limited the time for filing claims to June 1, 1894, and that he first learned of the making of such order on August 12, 1895, the day on which he made his petition. The court granted his petition for this reason. It is true, as claimed by appellant, that the statute does not require the making of an order limiting the time in which creditors must present their claims, but the practice of making such an order and providing for the giving of notice thereof to creditors has been in vogue in many, if not all, of the judicial districts of the state for a number of years, and it is a fact that the court did make such an order in this case, and we are not prepared to say, in view of the admitted facts of this case, that it was an abuse of the court's discretion to permit a creditor who had no notice of the making of the order to prove his claim 14 months after the expiration of the time limited in the order.

Order and judgment affirmed, with statutory costs to respondent on one appeal only.

JANE B. ROBERTS v. MARTIN G. NELSON.[1]

June 19, 1896.

Nos. 10,105—(172).

Lease—Denial of Execution—Evidence.

In an action on a written lease, evidence that after its execution it was altered by adding the name of a second witness and a certificate of acknowledgment is inadmissible under a mere denial of the execution of the instrument.

Same—Alteration of Terms—Alteration Affecting Proof of Execution.

Distinction noted between an alteration of the terms and stipulations of the contract itself and one which merely affects the nature and kind of evidence required to prove its execution.

Action in the district court for Hennepin county. The case was tried before Russell, J., who ordered judgment in favor of plaintiff for $730 and other relief. From an order denying a motion for a new trial, defendant appeals. Affirmed.

[1] Reported in 68 N. W. 14.

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Judson L. Wicks, for appellant.
Dickinson & Lum, for respondent.

MITCHELL, J. This was an action by a lessor against his lessee for the cancellation and forfeiture of a lease on the ground of the nonperformance of its covenants and conditions. The lease was set up in the complaint in its very words. The answer of the defendant, so far as here material, consisted of a denial of the execution of the lease. The bill of exceptions states, in substance, that in the course of the introduction of the evidence on part of the defendant he offered to prove that the lease had been changed after its execution by adding the signature of a second witness and a certificate of an acknowledgment of its execution by defendant before a notary public; that the added witness was not present when defendant signed the lease, and was never requested by him to sign it as an attesting witness, and that defendant never acknowledged it before the notary. The ruling of the court in sustaining plaintiff's objections to this evidence is the only error assigned.

As we are of opinion that the case must be disposed of on a question of pleading, it is unnecessary to consider the other questions discussed by counsel. Defendant did not offer to prove that he did not execute the lease, but what he offered to prove was that, after it was executed and became an operative contract, it was materially altered, and thereby avoided. It will be observed that it was not offered to prove that the terms and stipulations originally contained in the body of the lease had been altered, either in substance or in letter. The change produced in the instrument by the alleged alteration is not one which affects in any degree the construction of the instrument, or the rights or obligations of either party under it. At most, it only affects the nature and kind of evidence required to prove its execution. All that was necessary to the execution of the lease was that it should be signed and delivered. It was not necessary that it should be either witnessed or acknowledged. These were necessary only for the purpose of entitling it to record. While this court held otherwise in the early cases of Parret v. Shaubhut, 5 Minn. 258 (323), and Thompson v. Morgan, 6 Minn. 199 (292), and while it did not at once squarely overrule these cases (see Ross v. Worthington, 11 Minn. 323 [438]), yet for many years the doctrine

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of this court has been as above stated (Tidd v. Rines, 26 Minn. 201, 2 N. W. 497; Morton v. Leland, 27 Minn. 35, 6 N. W. 378; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870; Lydiard v. Chute, 45 Minn. 277, 47 N. W. 967).

The case therefore resolves itself into the question whether, under a denial of the execution of an instrument, a party can introduce evidence to show that after he executed it it was avoided, not by altering its terms and stipulations, but by adding the name of a witness and a certificate of acknowledgment, which at most only go to the probative force of the instrument when offered in evidence. Our opinion is that the question must be answered in the negative.

Under the Code the general rule is that under a denial in an answer no facts can be proved except such as show that plaintiff's statement of facts is untrue. Under a denial a party should not be permitted to show any fact that does not go to disprove the facts alleged. Evidence of facts which admit the act charged, but which avoid its force and effect, or which discharge its obligation, is inadmissible. Now, the position of the defendant in this case was, in effect, that under a denial of the execution of the lease he proposed, while admitting its execution, to prove subsequent alterations which avoided it, and discharged its obligation. It has been held that where the terms and stipulations of a written contract have been altered, and the contract is declared on as altered, the alteration may be proved under a denial. Schwarz v. Oppold, 74 N. Y. 307. This position may be strictly logical, because proof of the alteration shows that the plaintiff's statement of facts is untrue; that is, shows that the defendant never executed any such instrument as alleged. But this is as far as the rule should be extended with due regard to the spirit of the code system of pleading. It is true that the instrument as set out in the complaint contains the name of the second witness, and the certificate of acknowledgment; but these are no part of the contract, and are mere surplusage, and, if they had been entirely omitted, there would have been no variance between the pleading and the proof.

Plaintiff's objections were that the evidence was incompetent, irrelevant, and immaterial, the objection that it was inadmissible un-

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der the pleadings not being specifically made. If the evidence had been admitted, assuming that it was otherwise competent, we would not have reversed on that ground; but it by no means follows that we should reverse where evidence is excluded which is inadmissible under the pleadings merely because that objection was not specifically made.

Order affirmed.

STATE OF MINNESOTA ex rel. H. W. CHILDS, Attorney General, and Others, v. W. B. MARR and Others.[1]

65 243
175 548

June 19, 1896.

Nos. 10,162—(325).

Aitkin County—Commissioners—Vacancy in Office.

The repeal of Sp. Laws 1889, c. 412, by Laws 1895, c. 382, did not create any vacancy in the office of county commissioner of Aitkin county; but those who had been previously elected under the Special Laws of 1889 will continue, under G. S. 1894, § 657, to hold over until their successors are elected and qualified.

Same—Next Election.

A full board of five commissioners should be elected at the next general election,—those for the odd-numbered districts for the term of two years, and those for the even-numbered districts for the term of four years, as provided by G. S. 1894, § 661.

Petition of John Hennessy and others for leave to file in the name and on behalf of the state of Minnesota, on relation of petitioners, an information in the nature of a writ of quo warranto against W. B. Marr and others for recovery by petitioners of their offices as members of the board of county commissioners of Aitkin county and for ouster of respondents. The cause was heard on order to show cause why writ of quo warranto should not issue. Ordered that a writ of ouster issue.

H. W. Childs, *P. J. Murphy*, and *McClenahan & Mantor*, for relators.

F. W. Hall, for respondents.

[1] Reported in 68 N. W. 8.

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MITCHELL, J. The question is whether the relators or the respondents are entitled to the offices of county commissioners for the county of Aitkin.

The general law on the subject of boards of county commissioners, and the election and tenure of office of county commissioners, is contained in G. S. 1894, §§ 657–661, inclusive. Section 657 provides that the term of office of county commissioners shall continue "until their successors are elected or appointed and qualified." We think that this is a general provision that applies to all county commissioners, whether elected under a general or a special law, unless the special statute under which they are elected expressly provides otherwise. Section 670 provides for the filling of vacancies in the office from death, resignation, removal, or otherwise.

In 1889 an act (Sp. Laws 1889, c. 412) was passed providing that there should be elected at the next general election in Aitkin county three county commissioners, who should hold the office for two, four, and six years, respectively, from the first Monday in January, 1891; and that thereafter there should be elected biennially one commissioner, who should hold the office for six years. This act further provided that county commissioners in that county should be elected at large, and not by districts, as provided in the general statute.

The relators were elected under the provisions of this act, for terms of six years, commencing, respectively, on the first Monday of January, 1891, 1893, and 1895. In February, 1895, the legislature passed Laws 1895, c. 382, repealing the special law of 1889. Aitkin county being organized into towns, and polling more than 800 votes, in April, 1896, the relators, who still continued to act as the board of county commissioners, divided the county into five commissioner districts, as provided by sections 657 and 658, G. S. 1894. Subsequently, the chairmen of the boards of supervisors of the towns included within these several commissioner districts, upon the assumption that the repeal of the act of 1889 had created vacancies in all the offices of county commissioners, assembled, and, under the provisions of section 670, assumed to appoint the five respondents to fill the supposed vacancies in the five several districts. Under such appointment, the respondents have taken possession of the offices, and are acting as county commissioners, to the exclusion of relators.

The respondents' claim to the offices is founded upon the assump-

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tion that the repeal of the act of 1889 ipso facto terminated relators' terms, and created vacancies in the offices. The trouble, if no other, with this position, is that, if vacancies were created, they must have been created on the very day that the act of 1889 was repealed; while respondents, in support of their claim to the offices, have to rely on the subsequent act of relators, as a board of county commissioners, in dividing the county into districts. But, in our opinion, the repeal of the act of 1889 created no vacancies. The manifest purpose of the repeal was merely to provide for restoring the county to the provisions of the general laws on the subject. Like much careless and loose legislation, the repealing act made no express provision for passing from the operation of the special law to that of the general statutes.

But in view of the manifest purpose of the act, taken in connection with the provisions of the general statutes, as well as of the prior special law, the effect is that at the next general election there must be elected a full board of five commissioners, in accordance with the provisions of section 661,—those for the odd-numbered districts for two years, and those for the even-numbered districts for four years. In other words, for the purpose of passing from the special to the general law, the next election must be considered the first election. The terms of office of the five thus elected will all commence on the first Monday of January next. In the meantime the relators will hold over and constitute the board of county commissioners, under the general provision in section 657 that the term of office of county commissioners shall continue until their successors are elected or appointed and qualified. That the division of the county into five districts is merely prospective, and does not affect commissioners already qualified, was decided in Norwood v. Holden, 45 Minn. 313, 47 N. W. 971. The result is that the relators are entitled to the offices, and the respondents are not.

Ordered that a writ of ouster issue.

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JOHN J. NELSON v. JOSEPH ROGERS and Others.[1]

June 23, 1896.

Nos. 10,038—(205).

Redemption from Foreclosure—General Creditor of Decedent.

A general creditor of a deceased person, although his claim has been allowed against the estate, has no lien upon the real estate of the deceased which entitles him to redeem from the foreclosure of a mortgage executed by the deceased in his lifetime; following Whitney v. Burd, 29 Minn. 203. The Probate Code has not changed the law in that regard.

Action in the district court for McLeod county. The complaint alleged, in substance, that plaintiff was a creditor of one Rasmus Mikkelson, who died seised of certain land on which he had executed two mortgages; that the mortgages were foreclosed after his death by the mortgagee, who assigned the certificates of sale to defendant Thoney; that the time for redemption expired March 10, 1895, and that neither the heirs of the deceased mortgagor nor the holder of the certificate of foreclosure of the second mortgage redeemed; that plaintiff's claim was duly allowed by the probate court against the estate of the deceased mortgagor; that plaintiff, March 8, 1895, gave due notice of intention to redeem, and on March 16, 1895 (March 10th being Sunday), produced to the sheriff, defendant Rogers, the proper affidavit and the necessary records and files of his claim as allowed by the probate court, and tendered the sum necessary to redeem, and demanded a certificate of redemption, which was refused; that March 20, 1895, defendant Thoney, who then held the certificate of foreclosure, transferred said premises to defendant Oleson, but that the money was furnished by defendant Caroline Mikkelson (who was the wife of the mortgagor), under an agreement fraudulently made, before the foreclosure, between her and the mortgagee to defraud the creditors of Rasmus Mikkelson, and in order that they might not realize on their claims, by which agreement the heirs and widow were to allow the time for redemption to expire, and then the premises should be conveyed by the mortgagee to her. The complaint prayed that plaintiff be allowed

[1] Reported in 68 N. W. 18.

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to pay into court or to the sheriff the amount so tendered to him, and that he be required to execute to plaintiff a certificate of redemption, and for other relief. From an order, Cadwell, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

J. V. V. Lewis, for appellant.

F. R. Allen, for respondents.

MITCHELL, J. The only question in this case is whether a general creditor of a decedent, whose debt has been allowed as a claim against the estate, has a lien upon the real estate of the deceased which entitles him to redeem from the foreclosure of a mortgage executed by the deceased in his lifetime. The plaintiff admits that this was decided in the negative in Whitney v. Burd, 29 Minn. 203, 12 N. W. 530; but his contention is that the law is now otherwise, by virtue of the provisions of sections 102 and 107 of the Probate Code (G. S. 1894, §§ 4509, 4514), which read as follows:

"Sec. 102. * * * The allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate. * * *"

"Sec. 107. * * * No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent, provided that this provision shall not be construed as affecting any lien existing at the date of such death. * * *"

It is urged that the effect of these provisions is to make a claim against the estate, when allowed, a lien on the real estate of the deceased of the same nature and in the same sense as a judgment of the district court, upon which the creditor has a right of redemption under the statute precisely as upon any other judgment, and that the priority of right to redeem would be in accordance with the order in point of time in which the respective creditors filed their claims for allowance. Any such theory would be out of harmony with the whole history of the law on the subject of the right of redemption, and wholly inconsistent with the policy of the law in the administration of the estates of deceased persons.

While the right of redemption is statutory, yet in construing the provisions of the statutes as to who are redemptioners some regard must be had to what creditors were entitled to redeem in equity. It was never suggested that a creditor could maintain

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an action to redeem who had nothing more than the general common right of all creditors to have the general property of the debtor applied to the payment of his debts. To entitle a creditor to maintain such an action, it was always necessary that he should have some interest in or lien upon the land which, either at law or in equity, gave him a right to protect his interest in the specific property, or to have it appropriated in satisfaction of his claim to the exclusion of other creditors. A general creditor of the estate of a deceased person has no such interest in or lien upon any specific property of his debtor, even after his claim is allowed. If he can be said to have a lien at all, it is only in the same sense that the creditor of a bankrupt has a lien on the estate of the insolvent debtor. All creditors, with the exception of certain preferred ones, stand upon an equality. No one has any preference over another. The provisions of the Probate Code have not changed the law in that respect. The only purpose of section 102 was to provide that the allowance of a claim should establish it against the estate as conclusively as a judgment would. All the reasons for the decision in Whitney v. Burd obtain with equal force to-day. See, also, McNiece v. Eliason, 78 Md. 168, 27 Atl. 940.

If it is to the interest of creditors that a redemption should be made, it must be done by the personal representative of the deceased. If he should improperly decline, application should be made to the probate court to order him to do it. If the financial condition of the estate or its interests would render a redemption inexpedient, a creditor who thought it to his interest that one should be made might perhaps, by offering to advance the necessary funds, be entitled to action by the probate court requiring the personal representative to redeem. But whatever remedy, if any, a creditor has in such a case must be worked out through the probate court and the administration proceedings. He is not a redemptioner under the statute.

Order affirmed.

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JOHN C. OSWALD and Another v. MINNEAPOLIS TIMES COMPANY.[1]

June 23, 1896.

Nos. 10,101—(294).

Judgment against Corporation—Conclusiveness in Action under G. S. 1894, c. 76.

In an action by a judgment creditor under G. S. 1894, c. 76, for the sequestration of the assets of a corporation and the appointment of a receiver, the judgment against the corporation upon which the action is predicated is conclusive upon the stockholders as well as the corporation, unless impeached for fraud by a direct proceeding.

Corporate Indebtedness—Limit—Findings.

Findings considered, and *held* insufficient to show that the claim of certain creditors exceeded, when contracted, the limit of indebtedness for which, under the articles of association, the corporation should be liable at any one time.

Articles of Association—Parol Evidence to Vary.

Held, also, that evidence that at the time of the signing of the articles of association, and during the negotiations which resulted in their execution, it was verbally agreed among those who signed them and became stockholders that they should not be individually liable for corporate debts, was inadmissible, because tending to vary the terms, implied by law, of the articles themselves.

Constitutional Liability of Stockholders — Debts Due Stockholders

The constitutional individual liability of stockholders for corporate debts extends to debts due creditors who are also stockholders, as well as to debts due those who are not members of the corporation.

Basting v. Northern Trust Co., 61 Minn. 307, Followed.

Held, also, that the Northern Trust Company was a stockholder of the Times Publishing Company. Basting v. Northern Trust Co., 61 Minn. 307, followed.

Appeal by William S. Ankeny and Northern Trust Company, who were admitted as parties to the action, from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. Affirmed.

[1] Reported in 68 N. W. 15.

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Geo. T. Halbert and *Harrison & Noyes*, for appellant Ankeny.
Carman N. Smith, for appellant Northern Trust Company.
Cobb & Wheelwright, for respondents.

MITCHELL, J. A record of over 1,000 folios, and briefs with 60 assignments of error, appear formidable, but, when carefully sifted, it will be found that they contain a vast amount of chaff, and very little grain.

The plaintiffs, J. C. Oswald & Co., as judgment creditors, brought this action under G. S. 1894, c. 76, in behalf of themselves and all other creditors, for the appointment of a receiver and the sequestration of the assets of the Minneapolis Times Company, an insolvent corporation. Ankeny, a stockholder, appeared in the action, and interposed an answer to plaintiffs' complaint, the only substantial portions of which were (1) that plaintiffs' claim upon which the judgment was rendered was contracted after the limit of indebtedness had been reached which the corporation was authorized to contract by its articles of association; (2) that the suit on this claim, and the rendition of judgment thereon, and the issuing and return of execution, and the subsequent commencement of this action, were all the result and culmination of a fraudulent and collusive scheme entered into between plaintiffs and other stockholders and directors of the corporation, to wind up its affairs and force its dissolution.

As to the validity of plaintiffs' claim against the corporation, the judgment is conclusive against the stockholders until reversed for error or impeached for fraud by a direct proceeding. The judgment cannot be impeached collaterally by stockholders, any more than by the corporation itself. While the proceedings are profusely characterized as collusive and fraudulent, no facts are alleged or proved to substantiate the charge. It is not claimed that plaintiffs' claim was not a just and valid one, except that it exceeded the authorized indebtedness. There is neither allegation nor proof that the corporation was not insolvent, nor that its affairs ought not to be thus wound up, and its assets sequestrated. On the contrary, the evidence is conclusive that it was hopelessly insolvent, and that the very best thing for both stockholders and creditors was to wind up its affairs precisely in the way proposed by this action. Neither is

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there any evidence of bad faith or collusion unless the fact that both the plaintiffs and the directors and the great majority of stockholders were all alike willing and anxious that the affairs of the company should be wound up in this way, and to that end the legal proceedings were, as between them, amicable. The only fact alleged or attempted to be proved tending to show that these sequestration proceedings were not proper or necessary was that, at the time the execution on plaintiffs' judgment was issued and returned unsatisfied, there were sufficient funds in the hands of the treasurer to pay the judgment. But the corporation was hopelessly insolvent, and known to be so by the plaintiffs; and for them to have taken this money to pay this judgment under the circumstances would have amounted to an unlawful preference over other creditors, which would have required the corporation to make a voluntary assignment, and, in the event of its failure to do so, would have authorized such other creditors to force it into involuntary insolvency. In view of the provisions of the insolvent law, the requirement that the execution shall be returned unsatisfied is more formal than substantial, and hence its regularity will not be scrutinized very strictly. But, in any event, it cannot be thus attacked collaterally, any more than the judgment can.

The court was right in appointing a receiver and sequestrating the assets of the corporation. This disposes of the issue raised by Ankeny's answer to plaintiffs' complaint.

2. In pursuance of the order of the court, the creditors of the corporation became parties to the action, and exhibited their claims. A majority of these creditors were stockholders and directors of the corporation, but some of them were in no way interested in the corporation except as creditors. The only party who opposed the allowance of these claims was Ankeny. He interposed answers to all of them, the only substantial allegations of which were that these debts were contracted after the debt limit of the corporation had been reached, and that that fact was known at the time by the creditors.

All these claims were for money loaned or advanced to the corporation for legitimate use in its business, and it was so used. There is no evidence of any fraud or bad faith in the matter, and it clearly appears that the corporation had and retains the benefit of the

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money. In fact, the evidence amply justified the finding of the court that these various loans or advances were actually necessary and essential to the maintenance and continuance of the corporate business. The court finds that up to October 25, 1893, the articles of incorporation provided that the highest amount of indebtedness to which the corporation should at any one time be subject should be $100,000; that from and after May 1, 1893, up to October 25, 1893, the said limit of indebtedness was exceeded; but on the said October 25, 1893, the articles of incorporation were amended to provide that the highest amount of indebtedness at any one time should be $150,000, and that said limit of $150,000 was never exceeded. This is the only finding on the subject, and no other was ever asked for.

Waiving the question whether the finding that the articles of incorporation were amended so as to increase the debt limit was justified by the evidence, and striking it out entirely, the remainder of the finding is wholly insufficient to support Ankeny's defense to the claims. Conceding, without deciding, that the defense interposed would, under the circumstances, have been available if proven, the burden of proving it was on the party interposing it. The debts due these creditors were contracted on various dates between February, 1892, and October, 1893, inclusive. Under any view of the law, each of these debts would be valid up to the limit, and only invalid as to the excess. Kraniger v. People's Bldg. Society, 60 Minn. 94, 61 N. W. 904. For all that appears from the finding at the time any one of these debts was contracted, the entire indebtedness of the corporation at that date, including the debt then contracted, might not have exceeded the limit by more than a nominal amount, and even such nominal excess might have been caused by some other debt subsequently contracted. It requires no argument to show that, upon such a finding, at most nothing more than a nominal part of any one of these creditors' claims could be held invalid. Therefore the trial court committed no error in allowing them. This disposes of the issues between Ankeny and the creditors.

3. Among the creditors whose claims were thus exhibited and allowed was Henry Oswald. At a subsequent stage of the proceedings, he interposed a "supplemental complaint," to establish and enforce the constitutional individual liability of the stockholders for the corporate debts. This was the sole purpose of this complaint,

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and the only relief asked for. The names of those alleged to be stockholders, and the amount of stock held by each, were stated in this complaint. Of these alleged stockholders, Ankeny and the Northern Trust Company appeared, and interposed answers to this supplemental complaint. The answer of Ankeny occupies nearly one-ninth of the entire paper book, and consists largely of matter wholly irrelevant to any issues tendered by the supplemental complaint, which was very properly stricken out by the court.

Aside from denials, its only allegations, if any, which were at all relevant, were that, at the time the corporation was organized and its stock subscribed for, it was done with the express understanding and agreement among the stockholders that the company was organized and should be conducted as an exclusively manufacturing corporation, and that the stockholders should not be individually liable on their stock for corporate debts. The articles of corporation show that the company was not organized as a manufacturing corporation, and that, under these articles, the stockholders would, under the constitution, be liable for corporate debts to the amount of stock held or owned by them. Oswald v. St. Paul Globe Pub. Co., 60 Minn. 82, 61 N. W. 902. Upon the trial, Ankeny offered to show by the oral testimony of a witness that at the time of the signing of the articles of incorporation, and during the negotiations which led to the signing of them, it was agreed between all the parties signing the articles that there should be no liability greater than the amount of stock subscribed, and that he subscribed for his stock relying upon that agreement. This offer was properly rejected, under the rule that parol evidence is inadmissible to contradict or vary written contracts. This rule applies not only to what is expressed in the instrument, but also to all the implications and intendments which the law attaches to that which is expressed. It has been held that where a person accepts the written obligation of a corporation, and at the same time orally agrees that the stockholders should incur no personal liability for the claim, this agreement is binding, and may be proved by parol evidence, as a distinct and separate oral agreement. See Brown v. Eastern Slate Co., 134 Mass. 590. This is the extent to which the authorities cited by counsel go. But in such cases the effect of the evidence is not to prove a contemporaneous oral agreement varying the terms of the articles of incorporation,

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but a subsequent waiver of one of these terms for a valuable consideration. The parol evidence was properly excluded.

There is one other point made by the appellants that may be properly considered on this contention. It is that the constitutional liability of stockholders extends only to the claims of what counsel calls "outside creditors," and not to the claims of those creditors who are themselves stockholders. There is no merit in this contention. Stockholders may become creditors of a corporation the same as other persons, and the constitutional provision applies to all corporate debts without exception. Of course, a stockholder is not relieved of any part of this liability merely because he is also a creditor. The maximum amount for which he is individually liable depends upon the amount of stock owned and held by him, precisely as if he was not a creditor; and, in determining what percentage of that maximum he and they should be assessed, his claim is to be taken into account the same as the claims of other creditors. It is held in some jurisdictions that a creditor who is also a stockholder cannot bring an action at law against his co-stockholders to enforce a statutory liability for corporate debts; that the only remedy for such a creditor is by bill in equity for contribution. But however that may be, proceedings under chapter 76 being essentially equitable, as well as extremely flexible, in their nature, there is no difficulty in working out and enforcing through them the rights and liabilities, both legal and equitable, of all creditors and stockholders.

4. The answer of the Northern Trust Company to the supplemental complaint of Henry Oswald tenders only one material issue, which is that it denies that it is, or ever was, a stockholder of the insolvent corporation. An examination of the evidence discloses that the facts do not differ in any essential particular from those presented by the record when this same question was before us on the appeal in an action by the receiver to collect an unpaid stock subscription. Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721. In that case the trial court dismissed the action when the plaintiff rested, but we cannot discover that the evidence introduced by the Trust Company on this trial tended in any material respect to impair the force of the evidence on behalf of the plaintiff, which was substantially the same in both cases.

Counsel calls our attention to the fact that in the former case we

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erroneously assumed that, at the time of the demand for a transfer of the stock, the Trust Company left with the Times Company, not only the written notice that it was the owner of the stock, and demanded its transfer, but also the old certificate of stock, indorsed by Nimmocks, and the sheriff's certificate of the sale of the stock on execution, as evidence of its ownership; whereas it appeared on this trial that the Trust Company only left the notice with the Times Company, and, after producing and exhibiting the old stock certificate and the sheriff's certificate, took them away, after the refusal to transfer the stock. A careful reading of the opinion will show that the fact thus erroneously assumed to exist had no material bearing upon any of the grounds upon which the decision rested. The notice which was left was to the effect that the Trust Company was the owner of the stock, and demanded that it be transferred in its name on the books of the corporation. So far as a continuing demand was concerned (if that was at all necessary), this notice was just as effectual as if the Trust Company had left with it the evidences of its ownership of the stock. In the former case we gave this question as full and careful consideration as we were capable of, and we see no reason for changing the conclusion at which we then arrived; and, as we do not think we could add anything to the reasons which we then gave for that conclusion, no good purpose would be subserved by reopening the discussion of the subject.

What we have said disposes of every question raised by the numerous assignments of error of both appellants which we deem of sufficient importance to require any special notice.

Order affirmed.

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FRANKLIN D. SMITH v. EMIL MUNCH and Another.[1]

June 23, 1896.

Nos. 10,114—(306).

Malicious Prosecution—Probable Cause.

In an action for malicious prosecution, *held* that, upon the undisputed facts, the trial court should have held as a matter of law that the defendant had "probable cause" for instituting the prosecution.

Same—Province of Court and Jury.

What facts, and whether particular facts, constitute probable cause, is a question of law for the court; but what facts exist in a particular case, when there is a dispute in reference to them, is a question for the jury,—following former decisions.

Master's Liability for False Imprisonment by Servant—Furtherance of Business—Scope of Agency.

The superintendent of a manufacturing corporation had general charge of the premises, of the business, and of the employés while at work. While plaintiff was on the premises, he caused his arrest without any warrant on a charge of disorderly conduct, committed several hours before, in unlawfully entering the factory, and attempting by threats to induce the employés to quit work. This act on part of the superintendent was done, not for his own interest or benefit, but in furtherance of the interest of the corporation by protecting its premises and employés from trespassers and intruders. *Held*, that the facts brought the case within the general rule that a master is responsible for the torts of his servant done with a view to the furtherance of the master's business, whether the same be done negligently or willfully, but within the scope of his agency; and that the corporation was liable for the act of its superintendent in directing the unlawful arrest.

Same—Excess of Authority—Disobedience of Instructions.

The fact that the superintendent may have exceeded his actual authority, or even disobeyed his express instructions, does not alter the rule.

Separate appeals by defendants from an order of the district court for Ramsey county, Brill, J., denying motions for a new trial. Affirmed in part and reversed in part.

Lewis & Hallam, for appellants.

Francis H. Clarke, for respondent.

[1] Reported in 68 N. W. 19.

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MITCHELL, J. The complaint stated three causes of action against the defendants, one for false imprisonment and two for malicious prosecution, viz. for assault and battery, and for disorderly conduct. There being no evidence to connect either of the defendants with the prosecution of plaintiff for assault and battery, that cause of action was properly dismissed by the court, and hence need not be considered.

The record discloses the following facts: The defendant Munch was the superintendent of the shops and yard of the Bohn Manufacturing Company, his duties being to look after the workmen and the work, and see to it that the business was properly attended to. On July 12, 1895, about 25 of the employés (mostly young men and boys) in the box factory "struck," and quit work. Soon afterwards, and on the same day, plaintiff also went out, because he had been ordered to do work which one of the strikers had been doing. New hands were employed to take the place of the strikers. The next day, shortly before the noon hour, about 20 of these strikers congregated in the vicinity of the factory evidently waiting for 12 o'clock, in order to gain entrance into the building for the purpose of inducing the new employés to quit work, either by threats or persuasion. Plaintiff, in company with one of the strikers named Milander, in whose company he had been for most of the day, also came there, and either joined the crowd or waited in close proximity to it until the 12 o'clock whistle blew. Plaintiff's statement is that he went there at the request of his mother, to tell another boy who was working in the shop "not to go out on a strike." Milander's story is that his purpose in going into the factory was "to see some of the old employés, and see what they thought of the new boys who started." When the doors of the factory opened at 12 o'clock, the entire crowd, including plaintiff and Milander, entered the building. Considerable "fuss" ensued. One of the strikers assaulted a young boy who was employed in the shop. The term "scab" was applied to those who had taken the place of the strikers. Persuasion and some threats were used to induce the employés to quit. Some who had struck, and then gone back to work, were upbraided for doing so. Witnesses who claimed to have been eyewitnesses testified that the plaintiff intimidated one of the employés by swearing at him, and saying "if he did not get out of the factory he would fix him after

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five o'clock," and called the boy a "scab." Plaintiff himself admits, as also does his friend Milander, that he asked the boy "what he wanted to go out on the strike for, if he wanted to go back again." There was also evidence tending to show that, while the crowd was waiting outside, the plaintiff urged some small boys to strike one of the young employés who happened to come outside of the factory.

Defendant Munch was not present during any part of this time, but when he returned late in the afternoon he was informed of the trouble which had occurred during his absence, and was informed by employés who professed to be eyewitnesses, and who, so far as appears, were reliable persons, that plaintiff had committed substantially the acts as above stated. Munch testified that he honestly believed that these parties told the truth, and there is no direct evidence, and, so far as we can discover, no circumstantial evidence, tending to show that he did not believe these statements, or that he did not have reasonable ground for so doing. After these communications had been made to Munch, and about 5 o'clock in the afternoon, plaintiff, his friend Milander, and some others of the strikers, again came to the factory, as they testify, to get pay due them for work. Thereupon Munch called in a policeman, and directed him to arrest the plaintiff and one other of the ex-employés, for participating in the disturbance at noon. He gave this direction without having made any sworn complaint, or having procured any warrant for their arrest. The policeman obeyed the directions, arrested the plaintiff and the other boy, and required them to accompany him to the police station, where plaintiff was required to remain (but without being locked up) for about an hour and a half, until Milander went to plaintiff's home and obtained $15, which he deposited as security for his appearance on Monday morning; it then being Saturday evening. Plaintiff appeared in the police court on Monday morning, as also did Munch, with some witnesses from the factory. A formal complaint under the city ordinance was then made against plaintiff for disorderly conduct, which was sworn to by the boy who had been assaulted during the disturbance on Saturday noon. The case was adjourned for a day or two, when a trial was had, in which, after hearing the evidence on both sides, the court found the plaintiff not guilty.

On the trial of the present action the jury found a verdict against both defendants for $2,000, viz. $1,000 on each cause of action. The

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court ordered a new trial unless the plaintiff would stipulate to reduce the verdict on the first cause of action (false imprisonment) to $400, and on the second (malicious prosecution) to $300; or $700 in all. The plaintiff having consented to this reduction, defendants' motion for a new trial was denied, and from that order they appealed.

Defendants make the point that there was no evidence that defendant Munch caused, procured, or instigated the prosecution of the plaintiff for disorderly conduct; but we are of opinion that there was ample evidence to justify the jury in finding that the boy made the complaint at the instance of Munch. The point is also made by the Bohn Manufacturing Company that there was no evidence that it was in any way connected with instituting the prosecution, or that Munch, in doing so, was acting within the scope of his agency; but we do not find it necessary to consider that question. We are of opinion that the court erred in submitting this cause of action to the jury at all, for the reason that the plaintiff had wholly failed to prove that the prosecution was instituted without probable cause.

Many courts and authors have attempted to define what will constitute probable cause. This court has approved the definition laid down in Munns v. Dupont, 3 Wash. C. C. 31, Fed. Cas. No. 9,926, and, with certain qualifications or explanations, that given in Hilliard, Torts. Cole v. Curtis, 16 Minn. 161 (182). As to the prosecution of civil actions, see, also, Burton v. St. Paul, M. & M. Ry. Co., 33 Minn. 189, 22 N. W. 300. Perhaps as good a definition as can be given is that "probable cause" is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. 14 Am. & Eng. Enc. Law, 24, and cases cited. It is not necessary that the facts upon which the prosecutor acts shall be true. It is enough if he believed them to be true, and had reasonable ground for so believing. Neither is it necessary that he should know, or suppose he knows, of his own knowledge, the truth of the facts upon which he acts. He may act upon communications made to him by others if he has reasonable ground for believing, and does believe, that the communications are true. If every man was bound, under the penalty of heavy damages, to ascertain before he commences a prosecution that

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he has such evidence as will secure conviction, few prosecutions would be set on foot. The law, therefore, protects the prosecutor if he have reasonable and probable ground for the prosecution, that is, have such ground as would induce a man of ordinary prudence and discretion to believe in the guilt, and to expect the conviction, of the person prosecuted, and if he acts in good faith on such belief and expectation.

It is also the settled law that what facts, and whether particular facts, constitute probable cause, is a question of law for the court; but what facts exist in a particular case, when there is a dispute in reference to them, is a question exclusively for the jury. Cole v. Curtis, supra; Burton v. St. Paul, M. & M. Ry. Co., supra; Moore v. Northern Pac. R. Co., 37 Minn. 147, 33 N. W. 334; Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203. If the plaintiff committed the acts, under the circumstances which defendant Munch was informed he did, there is no doubt that he was guilty of disorderly conduct within the meaning of the city ordinance. The evidence is uncontradicted that these alleged acts of plaintiff were communicated to Munch, and that he believed them to be true, and acted upon them in that belief. There was, as already suggested, no evidence, either direct or circumstantial, to the contrary. Upon this state of the evidence the court ought not to have submitted the third cause of action to the jury, but should have instructed them, as a matter of law, that the undisputed facts constituted probable cause, and that defendants were not liable on that cause of action.

On the other cause of action (unlawful imprisonment) the defendant Munch is undoubtedly liable in some amount for directing the illegal arrest of plaintiff without any warrant, for plaintiff was not then in the commission of any disorderly conduct. The misconduct of which he was charged, and of which Munch had been informed, had been committed, if at all, at least five hours before.

The question remains, is the Bohn Manufacturing Company liable for the wrongful act of Munch? Munch was its general superintendent, having charge of its premises, its business, and its employés while performing their work. This duty impliedly included the protection of the premises and property from trespassers, and the protection of the employés, while at work, from the interference of intruders. The act of Munch in directing plaintiff's arrest was

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evidently not done in his own interest, or for his own benefit, but in the furtherance of the interest of the company by protecting its property and employés from wrongdoers. While there is much conflict in the decisions as to when a master is liable for the intentional torts of his servant, yet the tendency of the modern authorities is to extend the liability of the master in such cases; and the general rule may now be said to be that a master is responsible for the torts of his servant done with a view to the furtherance of the master's business, whether the same be done negligently or willfully, but within the scope of his agency. The fact that the servant, in committing the tort, may have exceeded his actual authority, or even disobeyed his express instructions, does not alter the rule. We think that the facts of the present case bring it within this rule.

The verdict of the jury was so excessive as to clearly indicate that it must have been the result of passion or prejudice, or, at least, that it was not rendered in a judicial frame of mind. The explanations of plaintiff and of his companion as to their reasons for going to the factory on this occasion are somewhat suspicious, to say the least of them. But, conceding that plaintiff went there for a proper purpose, he must have known, when he arrived, that the crowd of strikers was there for no proper or lawful purpose, and yet, so far at least as external appearances went, he identified himself with them, and accompanied them into the factory, where neither they nor he had any business to go, and when he must have known that the others were not going in for any lawful purpose. Under such circumstances plaintiff is certainly not entitled to any very large allowance of damages for injury to his feelings caused by his subsequent arrest. Furthermore, there is no evidence to justify the conclusion that Munch was actuated by any personal malice. He had "probable cause" for securing plaintiff's arrest if he had done so in a lawful way. His wrongful act consisted merely in ordering plaintiff's arrest without a warrant. Plaintiff's pecuniary injury was very small. But, under the circumstances, the damages ought not to be strictly limited to what would compensate mere pecuniary loss. Defendant Munch was bound to know that he had no right to order plaintiff's arrest without a warrant. The liberty of the citizen is a right not to be lightly invaded, and the penalty for any invasion of it should be sufficiently large to be a lesson to the wrongdoer that such an act cannot be committed with impunity.

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While $400 is larger than we think ought to have been awarded, yet as part of this will be absorbed by the taxable costs of this appeal, and as a new trial must, on the admitted facts, result in a verdict against the defendants for some amount, we have concluded to affirm the order appealed from as to the cause of action for false imprisonment, and reverse it as to the cause of action for malicious prosecution. So ordered.

JONAS M. KISTLER v. BOARD OF COUNTY COMMISSIONERS OF HENNEPIN COUNTY.[1]

June 24, 1896.

Nos. 9905—(187).

Coroner's Fees.

Where the coroner on the same day makes two separate examinations of two different dead bodies, or holds an inquest on one body, and makes an examination of the other, *held*, under G. S. 1894, § 5554, he is not entitled to a fee of five dollars for each examination and each inquest, or to anything more than five dollars per day "for the time actually spent."

Appeal by plaintiff from a judgment of the district court for Hennepin county, in favor of plaintiff for $109.10, entered in pursuance of the findings and order of Jamison, J. Affirmed.

Rea, Hubachek & Healy, for appellant.

F. M. Nye and *A. H. Nunn*, for respondent.

CANTY, J. During the month of August, 1895, the coroner of Hennepin county, Minnesota, in several instances made two separate examinations of two different dead bodies on the same day, or held an inquest on one body and made an examination of another on the same day. The only question involved in this appeal is whether he is entitled to a fee of five dollars for each examination and each inquest, or whether he is entitled to no more than five dollars per day for the number of days actually occupied in the service, as held by

[1] Reported in 68 N. W. 26.

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the court below. This depends on the construction of G. S. 1894, § 5554, which, so far as here material, reads as follows:

"And for an inquest or examination of a dead body they [coroners] shall receive five dollars per day for the time actually spent, and ten cents per mile to and from the place where such inquest or examination shall take place."

We are of the opinion that, under this statute, he is entitled to no more than five dollars per day "for the time actually spent"; and that if he makes two examinations, or an examination and an inquest, on the same day, he is not entitled to what, under the statute, would be double pay.

The judgment appealed from is affirmed.

JOHN COWLING v. ZENITH IRON COMPANY and Others.[1]

June 24, 1896.

Nos. 9910—(225).

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Corporation — Stockholders' Constitutional Liability — Mechanical Business.

Section 3, art. 10, of the constitution, provides: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him." *Held*, a "mechanical business," within the meaning of said exception, is one closely allied to, or incidental to, some kind of manufacturing business.

Same—Mining Iron Ore.

Held, further, the mining of iron ore is such a mechanical business, and the stockholders of a corporation organized for that purpose are exempt from the stockholders' "double liability."

Same—G. S. 1894, § 2834—Holding Stock in Other Corporations.

G. S. 1894, § 2834, being one of the sections of the act under which such a corporation was organized, does not prevent it from being a corporation whose stockholders are exempt under the constitution, if the corporation never took the benefit of that section.

[1] Reported in 68 N. W. 48.

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Action in the district court for St. Louis county. The complaint alleged, among other things, that defendant was, and since March, 1892, had been, a corporation organized and existing under and by virtue of the provisions of Laws 1876, c. 28, and the acts amendatory thereof and supplemental thereto (G. S. 1894, §§ 2827–2837). From an order, Ensign and Moer, JJ., overruling a demurrer to the complaint, defendant Carpenter appealed. Reversed.

Towne & Davis and *Billson, Congdon & Dickinson*, for appellant.

In construing Const. art. 10, § 3, we must recur to the condition of the constitution before it was amended, and consider the occasion, necessity, and object of the amendment. Minnesota & P. R. Co. v. Sibley, 2 Minn. 1 (13). See Cooley, Const. Lim. 65. The object was to encourage manufacturing. State v. Minnesota T. Mnfg. Co., 40 Minn. 213, 222, 41 N. W. 1020. Remedial laws are to be liberally construed. Martin v. Wakefield, 42 Minn. 176, 43 N. W. 966; White v. The Mary Ann, 6 Cal. 462; Sutherland, St. Const. § 207; Smith, St. & Const. Constr. § 491; Cooley, Const. Lim. 79. To give effect to the legislative intention, the ordinary meaning of the words "manufacturing corporations" may be enlarged or restricted. People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Commonwealth v. Northern E. L. & P. Co., 145 Pa. St. 105; 38 Amer. & Eng. Corp. Cases, 651, 657, 22 Atl. 839; Attorney General v. Lorman, 59 Mich. 157, 26 N. W. 311; People v. Wemple, 129 N. Y. 543, 29 N. E. 808. The provision of the constitution imposing upon stockholders a liability for the debts of the corporation is in derogation of common right, and to be extended no further than strict construction carries it; and the exception must be liberally construed. If the language leaves a reasonable doubt whether such a liability was intended to be imposed, the doubt must be resolved against the liability. Sutherland, St. Const. §§ 366, 371, 400; Gray v. Coffin, 9 Cush. 192, 199; Dane v. Dane Mnfg. Co., 14 Gray, 488; Chase v. Lord, 77 N. Y. 1; Danvers v. Boston, 10 Pick. 513; Moyer v. Pennsylvania Slate Co., 71 Pa. St. 293; Detroit v. Chaffee, 70 Mich. 80, 37 N. W. 882; Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815; Wakefield v. Fargo, 90 N. Y. 213; Coffin v. Rich, 45 Me. 507; Cook, Stock & Stockh. § 214. See Sutherland, St. Const. § 348. With reference to the words "manufacturing or mechanical business," the rule is to be observed which

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requires laws to be so construed, if possible, that effect shall be given to the whole of the language employed. State v. City of St. Paul, 36 Minn. 529, 32 N. W. 781; Brown v. Balfour, 46 Minn. 68, 48 N. W. 604; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 530, 51 N. W. 478; Harrington v. Smith, 28 Wis. 43, 67. This rule is applicable with special force to written constitutions. Cooley, Const. Lim. 58. It forbids construing "mechanical" as having the same meaning as "manufacturing." The language of the constitution is necessarily couched in broader and more general phrases than legislative acts. Houseman v. Commonwealth, 100 Pa. St. 222, 232; Endlich, Interp. St. 506. Words not having a fixed legal meaning should be construed in their broadest sense. County of Hennepin v. Grace, 27 Minn. 503, 8 N. W. 761; County of Hennepin v. Bell, 43 Minn. 344, 45 N. W. 615; County of Ramsey v. Church of Good Shepherd, 45 Minn. 229, 47 N. W. 783. If necessary, the meaning should be construed so broadly as to apply to conditions or means not then contemplated. Henshaw v. Foster, 9 Pick. 312, 317; Sutherland, Const. § 430. See Finnegan v. Noerenberg, 52 Minn. 239, 245, 53 N. W. 1150; Thompson, Corp. § 148.

The construction given by the legislature in Laws 1876, c. 28, is in accordance with the construction contended for. This enactment involved a construction of the constitution as having such meaning and effect as to justify the legislature incorporating in the law, then enacted for the organization of mining companies, the provision and inducement that such corporations should be exempt from stockholders' liability. To thus construe the constitution was a proper exercise of legislative power. Cooley, Const. Lim. 182, et seq. Such determination, when carried into effect by legislative enactment founded thereon, is to be respected by the judiciary. City of Faribault v. Misener, 20 Minn. 347 (396); Ames v. Lake Superior & M. R. R. Co., 21 Minn. 241, 288, 289; Cooley, Const. Lim. 67–70, 183; Sedgwick, Constr. Stat. (Pomeroy's Ed.) 412; Endlich, Interp. St. 527; Sutherland, St. Const. § 229; Edwards v. Darby, 12 Wheat. 206–210; United States v. Union Pacific Ry. Co., 148 U. S. 562, 13 Sup. Ct. 724; Union Ins. Co. v. Hoge, 21 How. 35, 66; Harrington v. Smith, 28 Wis. 43; State v. Timme, 54 Wis. 318, 340, 11 N. W. 785. And see Carson v. Smith, 5 Minn. 58 (78); State v. Cronkhite, 28 Minn. 197, 201, 9 N. W. 681; State v. Lee, 29 Minn. 458, 13 N. W. 913;

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Lovell v. Seeback, 45 Minn. 465, 48 N. W. 23; Bruce v. Schuyler, 4 Gilm. (Ill.) 221.

Pealer, Titus & Lemmon, for respondent.

To come within the exception, a corporation must be organized for carrying on an exclusively manufacturing or mechanical business or a business strictly incidental to or properly connected therewith. See State v. Minnesota T. Mnfg. Co., 40 Minn. 213, 223, 41 N. W. 1020; Mohr v. Minnesota E. Co., 40 Minn. 343, 346, 41 N. W. 1074; Arthur v. Willius, 44 Minn. 414, 416, 46 N. W. 851; Densmore v. Shepard, 46 Minn. 54, 60, 48 N. W. 528, 681; First Nat. Bank v. Winona Plow Co., 58 Minn. 167, 173, 59 N. W. 997; Oswald v. St. Paul Globe Pub. Co., 60 Minn. 82, 61 N. W. 903. To ascertain the "purpose" for which the corporation is "organized," we must look (1) to its articles of incorporation; (2) to the business it actually engaged in; (3) to the statutes under which its articles were made. Defendant was organized in 1892 under Laws 1876, c. 28, and the acts amendatory or supplemental thereto. By Laws 1876, c. 28, § 8, as amended by Laws 1881, c. 27, § 4, any corporation organized under this act may take, acquire, and hold stock in any other corporation, if the majority in amount of stockholders so elect. This section is as much a part of the powers of the company as if the same had been incorporated in its articles. See Cook, Stock & Stockh. § 3, note 1; 4 Am. & Eng. Enc. Law, 207; 1 Beach, Priv. Corp. § 26; 1 Morawetz, Priv. Corp. § 316. A mining corporation is not a manufacturing corporation. See Dudley v. Jamaica P. A. Co., 100 Mass. 183; Appeal of Commonwealth, 25 Am. & Eng. Corp. Cas. 324. See 14 Am. & Eng. Enc. Law, 256, 257, and note, 264, 269, and note 1; State v. Minnesota Thr. Mnfg. Co., 40 Minn. 213, 41 N. W. 1020. Both "manufacturing" and "mechanical" are used in reference to the business of making, creating, or constructing something. Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150. The encouragement of manufacturing was the purpose of this amendment. State v. Minnesota T. Mnfg. Co., supra. The general policy of the state, as expressed in the constitution, being that stockholders of corporations should be individually liable to the amount of their stock, the exception should be strictly construed. Arthur v. Willius, 44 Minn. 414, 46 N. W. 851. Sutherland, St.

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Const. § 328. "Manufacturing," "mechanical," and "mining" have a distinct sense. See Laws 1870, c. 26. Words may be expanded or limited in accordance with the intent, even should it be contrary to the letter of the statute or the constitution. Sutherland, St. Const. §§ 218, 237, 241, 246, 272, 273; 3 Am. & Eng. Enc. Law, 678; Barker v. Kelderhouse, 8 Minn. 178 (207); Grimes v. Bryne, 2 Minn. 72 (89). This court has invariably referred to this amendment as exempting "manufacturing" corporations alone. State v. Minnesota T. Mnfg. Co., supra; Mohr v. Minnesota El. Co., 40 Minn. 343, 41 N. W. 1074; Arthur v. Willius, supra; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110; Oswald v. St. Paul Globe Pub. Co., supra. Laws 1876, c. 28, is an attempted construction of the constitution by the legislature, which is for the judiciary. Rice v. Austin, 19 Minn. 74 (103). In the Matter of the Application of the Senate, 10 Minn. 56 (78); Cooley, Const. Lim. 57–59; Sutherland, St. Const. § 41; 3 Am. & Eng. Enc. Law, 673, 681; Bingham v. Supervisors of Winona Co., 8 Minn. 390 (441); Greenough v. Greenough, 11 Pa. St. 489; De Chastellux v. Fairchild, 15 Pa. St. 18; Cooley, Const. Lim. 109; Sutherland, St. Const. § 402.

Draper, Davis & Hollister, for Marshall-Wells Hardware Company, intervenor.

That portion of Laws 1876, c. 28, § 3, declaring that corporations organized thereunder should be deemed to be manufacturing and mechanical corporations, is unconstitutional. It has no binding force upon the courts, nor should it influence their decision. Cooley, Const. Lim. 78, 87, 94; Ervine's Appeal, 16 Pa. St. 266; People v. Judge Twelfth District, 17 Cal. 548, 559; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962. As a question of judicial construction, independently of the provisions of Laws 1876, c. 28, defendant company is not a corporation organized for the purpose of carrying on a manufacturing or mechanical business within the meaning of the exception. State v. Minnesota T. Mnfg. Co., 40 Minn. 213, 41 N. W. 1020; Mohr v. Minnesota E. Co., 40 Minn. 343, 41 N. W. 1074; Arthur v. Willius, 44 Minn. 409, 46 N. W. 851; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681; First Nat. Bank v. Winona Plow Co., 58

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Minn. 167, 59 N. W. 997. The power conferred upon defendant company to hold stock in any other corporation precludes it from being classed as a manufacturing or mechanical corporation. The charter of a company formed under a general law consists, not only of its articles of association, but also of the general statutes of the state under which the organization takes place. People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798; Elleman v. Chicago J. R. & U. S. Co., 49 N. J. Eq. 217, 23 Atl. 287; Lincoln Shoe Mnfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480; Morawetz, Priv. Corp. § 319; Grangers L. & H. Ins. Co. v. Kamper, 73 Ala. 325.

CANTY, J. This is an action under G. S. 1894, c. 76, and a defendant stockholder appeals from an order overruling his demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The question involved is the important one of whether the stockholders of a corporation organized to mine iron ore are exempt from the stockholders' "double liability."

In article 10 of the constitution it is provided (section 3):

"Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

The general nature of the business of the defendant corporation, as expressed in its articles of incorporation, is "the mining, smelting, reducing, refining, and working of iron ores and other minerals, and the manufacture of iron, steel, copper, and other metals." The only business actually carried on was that of mining.

We cannot hold that mining is a "manufacturing" business, in any proper sense of the word. See Byers v. Franklin Coal Co., 106 Mass. 131. If this corporation comes within the exception, it must be because the business of mining iron ore is a "mechanical business," within the meaning of the constitution. But, if the stockholders of a mining corporation are exempt, why are not the stockholders of a corporation organized to grade and construct railroads, or a corporation to build houses, or one to grade streets, or one to build sewers or ditches, or one to fence, clear, and break farms? Thus, the list of the corporations carrying on different kinds of business more or less of a mechanical nature could be expanded

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until the exception contained in the constitution would be the rule, and the rule the exception,—until the corporations whose stockholders were exempt would be far more numerous than those whose stockholders were not exempt. Clearly, this was not the intention of the makers of the constitution.

On the other hand, we cannot wipe the word "mechanical" out of the constitution; we must give it some effect. What, then, is the proper interpretation of this constitutional provision?

We must determine that by considering what object the makers of the constitution had in view when this exception was inserted by the amendment of 1872. The exemption provided for by this amendment was intended to foster manufacturing within this state, and, to that end, to promote the establishment of manufacturing corporations. This is a matter of common knowledge. We are of the opinion that it was the intention of the makers of the constitution to exempt from liability the stockholders of corporations organized to carry on any such kind of mechanical business as is incidental to or closely allied with some kind of manufacturing business. Thus, a concern engaged in the business of manufacturing iron might well, as a mere extension of that business or as incidental to it, mine its own ore, especially so if the manufacturing plant and the mines were in the same locality. In any event, the mining of iron ore and the manufacturing of iron are allied industries; the prosecution of the former tends to promote the latter. It is true that, up to the present time, the iron ore mined in this state has all been carried out of it, to promote manufacturing elsewhere, and the vast development of our iron mines has not appreciably increased the manufacture of iron within this state. But that does not change the principle. And, besides, the conditions may in time change so that a large portion of the iron mined in the state will also be smelted and manufactured here. Then, we are of the opinion that corporations organized to mine iron ore come within the exception in the constitutional provision, and the stockholders of such corporations, holding none but fully paid-up stock, are exempt from further liability.

G. S. 1894, § 2834 (being one of the sections of the act under which the defendant corporation was organized), provides:

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"Any corporation organized under this act may take, acquire and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect."

This section seems to authorize the corporation, by such election, and without regard to what its articles of incorporation may provide, to engage in the business of owning and holding the stock of other corporations, of any and all kinds. Respondent contends that, therefore, a corporation organized under this act is not a corporation organized for the purpose of carrying on an exclusively manufacturing or mechanical business, and its stockholders are not exempt. This is certainly a peculiar statutory provision. But as section 2829 (one of the sections of the same act) attempts to exempt from liability the stockholders of all corporations organized under the act, and as this section could not be given effect if it was held that every corporation organized under the act was necessarily "organized" to hold stock in all other kinds of corporations, we must hold that it is not so "organized" until "a majority in amount of the stockholders shall elect" to take and hold such other stock. In other words, we are of the opinion that, under the different provisions of the act, it is proper to regard the election of such stockholders to take and hold such other stock, under section 2834, as an amendment to the articles of the corporation. It does not appear that the stockholders of the defendant corporation ever made any such election. Therefore it is not organized for any such purpose.

This disposes of the case, and the order appealed from is reversed.

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CHRIS. E. EVANS and Another v. WAYLAND W. SANFORD and Others.[1]

June 24, 1896.

Nos. 9969—(191).

Mechanic's Lien—Sufficiency of Description.

Under G. S. 1894, § 6237, the description in a lien statement of the premises to be charged with a lien, *held* sufficient.

Same—Surplusage—Exceeding Limit.

After rejecting the erroneous part of the description as surplusage, the remaining description covered a tract of land exceeding the statutory limit, but all of it was owned by the lien debtor. *Held*, this did not vitiate the lien, but the court could carve out of such tract a tract within such limit, and adjudge the lien to be upon the same.

Action in the district court for St. Louis county to reform and foreclose a mechanic's lien. Defendant Taylor claimed a lien upon the premises by virtue of two mortgages executed to him by defendant Sanford and wife. The case was tried before Morris, J., who found as facts, among other things, that Taylor received the mortgages with full notice and knowledge that Sanford intended to make the improvements referred to in the opinion, and of the construction of the building on account of which plaintiffs claimed a lien, and of the claims and right of plaintiffs to a lien upon the premises. As conclusion of law, the court found that plaintiffs were entitled to the relief demanded. From an order denying a motion for a new trial, Taylor appealed. Affirmed.

Jaques & Hudson, for appellant.

John Jenswold, Jr., for respondents.

CANTY, J. The only question in this case is the sufficiency of the description in the mechanic's lien statement filed in the register's office. The defendant Sanford was the owner of three adjoining city lots known as lots 6, 7, and 8. The plaintiffs performed labor and furnished material for Sanford in the erection of a dwelling house which was built upon and on each side of the dividing line between lots 6 and 7. Lot 6 is west of lot 7. The premises described in the lien statement are the east half of lot 7 and the

[1] Reported in 68 N. W. 21.

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west half of lot 6, whereas the house is situated on the west half of lot 7 and the east half of lot 6, on which the court below declared a lien to exist for the amount due. G. S. 1894, § 6237 provides:

"The validity of the lien shall not be affected by any inaccuracy in the statement, relating to the property to be charged with it, if such property can be reasonably recognized from the description. * * *"

Under this statute this court has construed descriptions of the premises in such lien statements liberally in favor of the lien. See Russell v. Hayden, 40 Minn. 88, 41 N. W. 456; Northwestern C. & C. P. Co. v. Norwegian-Danish E. L. Seminary, 43 Minn. 449, 45 N. W. 868; Nystrom v. London & N. W. A. Mortgage Co., 47 Minn. 31, 49 N. W. 394; Tulloch v. Rogers, 52 Minn. 114, 53 N. W. 1063; Bassett v. Menage, 52 Minn. 121, 53 N. W. 1064. By applying the same rule here, we are of the opinion that the description should be held sufficient. It appears on the face of the lien statement and by an inspection of the premises that the description is erroneous. It appears that the two half lots specified are not adjacent, and no house is situated on them, but, on the contrary, they are separated by the other two halves of the same lots on which a dwelling house had just been erected. Then we are of the opinion that the descriptions "east half" and "west half" should be rejected as erroneous and surplusage. It seems to us that a person of ordinary understanding ought to be able to find and recognize the premises intended by the description. It is true that these plaintiffs, at the time during which they were erecting the house in question, were also erecting another house for Sanford on lot 8. But we cannot see that this fact raises a latent ambiguity which renders the description in the lien statement void for uncertainty.

In the description, "lot 6" and "lot 7," sufficient is left to distinguish the house intended. The fact that this description, after rejecting the erroneous part of it as aforesaid, would include two full lots, which might exceed the statutory limit, does not vitiate the lien. Boyd v. Blake, 42 Minn. 1, 43 N. W. 485. The court had a right to carve out a tract within the limit, as it has done.

The order denying a new trial is affirmed.

BUCK, J. I dissent upon the grounds that the description in the lien statement filed was insufficient and did not describe the prem-

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ises upon which the dwelling house was erected and for the erection of which the labor was performed and material furnished. I think that such a radical "carving" as is applied in this case to uphold the mechanic's lien is not justified by the facts or the law, and establishes a dangerous precedent.

LESLIE WELTER v. CHARLES B. HILL.[1]

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June 24, 1896.

Nos. 9995—(254).

Sale of Crop—When Title Passes.

Where a crop, to be thereafter raised, harvested, and threshed, was sold before the seed was sown, *held*, the contract of sale was not an executed, but an executory, contract, and on the evidence the jury were not warranted in finding that the title passed until the grain was ready for delivery.

Appeal by defendant from a judgment of the district court for Clay county in favor of plaintiff for $1,092.52, after a trial before Baxter, J., and a jury. Reversed.

Burnham & Tillotson and *George S. Grimes*, for appellant.

C. A. Nye, for respondent.

CANTY, J. During all the time hereinafter stated one Bodkin was the owner of a certain farm in Clay county, in this state, on which he carried on the business of farming. On March 15, 1894, the Economist Plow Company recovered judgment against him for the sum of $2,102.26 in the district court of that county, and on August 2 of the same year caused execution to be issued thereon and levied on about 100 acres of growing flax which was being raised by Bodkin on this farm. This action was brought by plaintiff, claiming to be the owner of the flax, against the sheriff for the conversion of the same. Plaintiff had a verdict. Defendant's motion for a new trial was denied, and he appeals from the judgment thereafter entered.

[1] Reported in 68 N. W. 26.

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It is assigned as error that the verdict is not sustained by the evidence, and, in our opinion, the assignment is well taken. Plaintiff claims to have purchased the field of flax from Bodkin in the spring, before the seed was sown, and to have received a bill of sale of the same. No bill of sale was produced on the trial, and there never was any apparent change of possession, but Bodkin sowed the flax, apparently as his own. However, no question seems to have been raised, and no issue tried, as to whether there was any actual fraud in the alleged sale, or any constructive fraud, except as it is claimed by appellant that the evidence is conclusive that the transaction, if there was any, was a chattel mortgage, and not an absolute sale; and that it is void as against creditors, because never filed with the town clerk as required by G. S. 1894, §§ 4129, 4130. On this question we will not pass, as we are of the opinion that the next question disposes of the case.

Appellant contends that, conceding the contract to be in the nature of a sale, and not of a mortgage, still the evidence does not warrant a finding that it was anything more than an executory contract of sale under which the title to the property had not passed from Bodkin to plaintiff at the time of the levy. In our opinion, the point is well taken. It is the well-settled law of this court that "where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, 'into a deliverable state,' the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." See Restad v. Engemoen, supra, p. 148, 67 N. W. 1146. What circumstances are there in this case "indicating" such "contrary intention"? Simply the naked statement of the witnesses that Bodkin gave plaintiff a bill of sale of the flax, without a particle more of evidence to show what the contents of that bill of sale were, except what is hereinafter stated, while there is much evidence and many circumstances in the case to show that the transaction between them was merely an executory and provisional one. On the trial, Bodkin was called by plaintiff, and testified:

"Q. State what you did with the crop of flax by way of selling it, if you did sell it. A. Yes, sir. Q. To whom? A. I sold it to Leslie

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Welter. Q. When? A. Some time in April, just before I put it in; the time I made my agreement for my groceries. Q. What was the consideration? A. It was in the neighborhood of five hundred dollars; didn't know but what I might want more or less groceries. * * * Q. When did he commence delivering you the goods? A. The first goods I got was about the first of April. Q. Did you continue to use goods from his store? A. Yes, sir. Q. Do you know about, as near as you can state, how many hundred dollars' worth of goods you had? A. I think about in the neighborhood of six hundred dollars. I could not say positively, because he rendered his bill monthly. Q. It overrun some what he paid for the flax? A. Yes, sir. * * * Q. Where was the bill of sale given? A. In Welter's store. Q. Was it given at the time of your talk with him about it and arrangement to give it? A. I told him I would get it written out or write it myself. Q. Who wrote it out? A. I wrote it out myself. Q. But not at the same time of the conversation you had with him when you agreed to give it? A. No, it was at the time we came in for more goods. Q. When did you have the first conversation with him about this bill of sale? A. About the first of April. Q. Tell me what this conversation was so far as it related to what was a sale of this crop. A. I went in and saw Mr. Welter, and asked him if he could furnish me some goods during the summer. I had a judgment over me on account of this plow company, and I wanted some groceries, and asked him if he would carry me, and asked him if a bill of sale of flax that would be put in on the north half of section seventeen would be satisfactory. I didn't make up my mind where I was going to put it in, but I knew it was on that half section; so he said it would be all right. I wanted about five hundred dollars, and told him I would fix up the judgment. Q. So he consented? A. Yes, sir. Q. It was to secure him, and he would advance you groceries? A. Yes, sir. Q. To what extent? A. Five hundred dollars. * * * Q. Was there any conversation at the time you gave him the bill of sale,—any further conversation? A. I handed him the bill of sale, and he read it over, and put it in the safe. I don't remember any other conversation. * * * Q. Suppose that the hail had destroyed this crop, you were still to pay Mr. Welter for the groceries? A. We had no such supposition. We didn't talk that over, or anything else. Certainly I calculate to pay my debts, if you fellows will let me."

Plaintiff testified in his own behalf as follows:

"Q. You know Bodkin? A. Yes, sir. Q. State what, if anything, was the business transaction you had with reference to this crop of flax on this particular quarter section, and when did it occur? A. Mr. Bodkin came to me along about the first of March or first of April, and told me he would want his groceries during the coming season, and wanted credit. I knew of a judgment being against him from the court preceding that, and he said there was a judgment against him for quite a large amount, but he had made arrangements with them

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to wait until after harvest, and that he wanted to sell me part of his crop to buy his groceries with. He told me he was going to sow different kinds of grain, and I selected the flax. Q. And what particular place did you select? A. It was the flax to be sown on a certain half section. He didn't know which part it would be in, and he had so much seed, and that seed, I figured, would cover about so many acres, and he agreed to put that in as my crop. Q. State whether or not you delivered him any goods as consideration. A. Yes, sir. Q. How much was the consideration to be? A. Five hundred dollars' worth of groceries. Q. The consideration for the crop was $500 worth of groceries? A. Yes, sir. Q. Did you deliver the goods? A. I did. Q. State whether there was any writing or bill of sale given. A. Afterwards he came in, and gave me a bill of sale. I didn't at the time consider a bill of sale necessary, but he came in afterwards, and handed me a bill of sale. * * * Q. What proportion had been furnished [of the groceries] at the time of the levy? A. I don't remember. I think probably there had been nearly four hundred dollars' worth. * * * Q. Is that your customary way of doing business? A. No, sir; I never did that before; but I was speculating a little in flax." After stating that he searched for the bill of sale, and could not find it, he further testified: "Q. What was that bill of sale? A. I remember it contained a bill of sale of all the flax to be grown on the north half of section seventeen in this town and range,—the town Mr. Bodkin's farm is located in,—the land involved in this suit." He further testified that he could not state the contents of the bill of sale any further than he had already done; that it was not on a printed blank, but was all written, and expressed a consideration of $500. He further testified that at the time of the levy Bodkin turned over to him collateral notes to the amount of $200, and he collected a part of them. The witness further testified: "Q. When did he turn this over? A. I think at about the time of the levy. I told him I needed money, and it looked as if this was going to be tied up for a long time, and I wanted him to help me out; so he turned this over as additional collateral. Q. As collateral to the contract or bill of sale? A. Yes, sir."

This is all of the evidence that it is necessary to consider. It must be remembered that the prior conversations of the parties as to the contract they were making were all merged in the bill of sale. Plaintiff does not claim that he rented the ground from Bodkin. He claims that he bought the crop. When did the title to the property pass? It did not pass when the bill of sale was made, because it was not then in existence. There was nothing then in existence but the seed, which was not yet sown. Plaintiff does not claim that he bought that, and, even if he had, it would not entitle him to follow that seed into the crop, and claim the whole crop.

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Calling the transaction a sale and the instrument a bill of sale did not make the contract an executed one, when the facts show that it was not. If the title did not pass when the bill of sale was made, when did it pass? We see nothing in the case which warrants a holding that it passed, or would pass, before the crop was threshed and ready for delivery. The levy was made prior to that. If the verdict in this case could be sustained, it would illustrate the beautiful uncertainty that in many cases would exist as to which of two parties is the owner of the personal property in question. There ought to be at least some general principles of law more definite and certain than the uncertain guess of the jury in each case. That guess ought to be confined to a much narrower range than it would be if this verdict could be sustained.

The judgment is reversed, and a new trial granted.

OLIVER MINING COMPANY v. MERRILL M. CLARK and Others.[1]

65 277
69 75

June 24, 1896.

Nos. 10,060—(290).

Vendor and Purchaser—Specific Performance—Delay—Enforcement against Subsequent Purchaser of Vendor.

The complaint alleges that the plaintiff (vendee), holding an executory contract for the purchase of land, refused to accept the conveyance tendered by the defendant C. (vendor), because the title was unmarketable, and the land incumbered with the liens of certain judgments against a prior grantor, M. (which judgments were docketed before the conveyance by him to C.); that thereafter C. conveyed the land for value to the defendant A. E. Co., with notice of plaintiff's rights; and that the title has since improved by reason of the removal of some of said judgments, and the better financial condition of the judgment debtor, M. This action was since brought to compel specific performance of plaintiff's contract, and the complaint also alleged certain other clouds on the title, which plaintiff proposed to waive, and accept specific performance regardless of them. *Held*, for the reasons stated in the opinion, the court below did not err in striking out these latter allegations as irrelevant and redundant.

[1] Reported in 68 N. W. 23.

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Appeal by plaintiff from an order of the district court for St. Louis county, Moer, J., granting defendants' motion to strike from the complaint certain portions as irrelevant and redundant and as surplusage. Affirmed.

Billson, Congdon & Dickinson, for appellant.

A. A. Harris, Henry E. Harris, and *O. W. Baldwin*, for respondents.

CANTY, J. This is an appeal from an order striking out a part of the complaint as irrelevant and redundant.

The action is one for specific performance. The complaint alleges that on January 8, 1894, one Merritt was the owner of a certain undivided interest in a certain tract of land, and on that day conveyed such interest to one Clark, the deed of conveyance being recorded in the register's office on February 13, 1894; that on January 3, 1895, Clark, for a valuable consideration, did execute under seal to plaintiff a written agreement giving plaintiff the option for 60 days thereafter to purchase said undivided interest, which within the 60 days plaintiff elected to do, and so notified Clark, and was about to tender performance to him, "when said Clark thereupon waived such tender, and thereupon this plaintiff demanded from said Clark a conveyance of said premises"; that within six or seven days thereafter Clark tendered plaintiff a deed, but plaintiff refused to accept the same, or perform, because the premises were incumbered as hereinafter stated. Within three months prior to February 13, 1894, when the deed from Merritt to Clark was recorded as aforesaid, five money judgments were docketed against Merritt, and became liens on said premises. Shortly afterwards two more money judgments were docketed against Merritt, and the judgment creditors commenced creditors' suits against Merritt and Clark, alleging that the conveyance from the former to the latter was made for the purpose and with the intent of defrauding Merritt's creditors, and in each action a notice of lis pendens was filed. It is further alleged that thereafter, on March 11, 1895, Clark conveyed the premises to the American Exploration Company, and the latter then well knew of plaintiff's rights in the premises. It is further alleged that one of said creditors' suits has since been dismissed, and the judgment of the other creditor has been satisfied by a sale of the

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premises, and a redemption from the sale, and that all of said other judgments have been paid and satisfied except two, one for $215 and the other for $5,238. It is further alleged that since the tender of said deed by Clark to plaintiff, the financial condition of Merritt has greatly improved, that he will in time pay all of the judgments against him, and now has property sufficient for that purpose. The prayer is that the exploration company be decreed to convey to plaintiff on performance on its part, but that a deduction of said amounts of $215 and $5,238 be made from the purchase price to be by it paid for the premises.

The foregoing is all that it is necessary here to state of what is left of the complaint after such portion was stricken out. The part stricken out is known as the thirteenth division of the complaint, which sets forth a large number of other money judgments which were entered and docketed against Merritt after the conveyance from him to Clark was recorded, and before the deed of Clark was tendered to plaintiff as aforesaid; and it is alleged that the obligations and causes of action on which these judgments were recovered existed before the conveyance from Merritt to Clark was made; that this conveyance was made without consideration, and for the purpose and with the intent of defrauding the creditors of Merritt, of all of which plaintiff had notice when Clark tendered the deed to it as aforesaid, and that all of these judgments are liens on the premises. We are of the opinion that all of this matter was properly stricken out.

It is contended by appellant that the allegations so stricken out show that the title of Clark was unmarketable; that it was not bound to accept such a title, and therefore it was justified in refusing the tender of the deed from Clark. If the rights of no one but Clark were here involved, we are not prepared to say that these allegations would not be material as tending to excuse plaintiff's delay in enforcing specific performance. As against Clark, we see no reason why plaintiff should not be allowed to take advantage of the changed conditions coming from the removal of some of the judgments as aforesaid, and the better financial condition of Merritt. But, while Clark may be a proper party to this action, he is merely a nominal party; specific performance must be enforced against the exploration company alone. The only relief which can

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be had against Clark is for damages. The allegations of the complaint make no case for such damages, and none are sought. But although the exploration company had notice of plaintiff's rights, it seems to us it stands in a somewhat better position than Clark would if he had retained the title. The plaintiff would not, when the time for performance arrived, take its chances on this title. The exploration company took these chances, and paid a valuable consideration for the property. As far as the record shows, it acted in good faith in accepting a title refused by plaintiff. The subsequent change of conditions by which the title to the property has become somewhat better were not within the control of Clark, have not been brought about by his procurement, and, as far as appears, could not be reasonably anticipated. It is not necessary here to decide, and we do not decide, whether or not plaintiff is estopped, as against the exploration company, to take advantage of these changed conditions. The question has not been argued. But we do decide that, as against the exploration company, the change in conditions furnishes plaintiff no excuse for the delay and change of front which has taken place on its part.

This disposes of the case, and the order appealed from is affirmed.

On Petition for Reargument.

July 3, 1896.

CANTY, J. In its petition for reargument appellant urges that in our opinion herein we have not given sufficient importance to the allegations of its complaint that its contract with Clark was in full force and effect when the exploration company purchased of him, and that at the time it so purchased it well knew of plaintiff's rights. We fully considered the effect of these allegations. But, lest the opinion may not be fully understood, we will add a few words to what is there said.

When plaintiff refused Clark's title, that title was hopelessly involved. It was wholly out of Clark's power to clear it, and there was no probability whatever that it would ever be any better. Under these circumstances, a refusal by plaintiff to accept the title was intended to be an irrevocable refusal, and the exploration company had a right so to understand it. What was there at that time for plaintiff to wait for? It could not lie by, act dog in the manger,

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refuse an incurable title itself, and for an indefinite length of time prevent every one else from taking that title. Under the circumstances appearing in the complaint, the exploration company had a right to regard plaintiff's refusal to accept this incurable title as an election to proceed for damages, if for anything. So far as appears by the complaint, the subsequent improvement of the title was wholly unexpected, and could not have been anticipated. Then, as to the exploration company, plaintiff's present suit must be regarded largely as an afterthought. For these reasons we held that the matter stricken out of the complaint furnished plaintiff no excuse for its delay of about a year in proceeding for specific performance.

The motion for a reargument is denied.

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65 334
66 414

JOHN ANDERSON and Another v. ANDERSON IRON COMPANY and Others.[1]

June 24, 1896.

Nos. 10,011—(180).

Corporation — Stockholders' Constitutional Liability — Mechanical Business.

The articles of incorporation of the defendant corporation construed, and *held*, it was not organized for the purpose of carrying on an exclusively mechanical business, such that its stockholders were exempt from "double liability," under the rule laid down in Cowling v. Zenith Iron Co., supra, page 263.

Same—G. S. 1894, § 2829—Dealing in Mineral Lands.

So far as G. S. 1894, § 2829, attempts to exempt from such liability stockholders of corporations organized for the purpose of "buying," "selling, and dealing in mineral" lands (as provided by section 2827), it is unconstitutional and void.

Appeal by defendant Macfarlane and others from an order of the district court for St. Louis county, Morris, J., overruling a demurrer to the complaint. Affirmed.

[1] Reported in 68 N. W. 49.

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S. T. & Wm. Harrison, for appellants.
Henry F. Greene, for respondents.

CANTY, J. This case was argued with that of Cowling v. Zenith Iron Co., supra, page 263, and, like that case, this is an action under G. S. 1894, c. 76. But the articles of incorporation in this case are somewhat different, and provide:

"The general nature of the business to be carried on shall be mining, smelting, reducing, refining, and working iron, copper, and other minerals, working stone quarries, and marketing the material from all the same; also buying, selling, leasing, and dealing in mineral lands for the above purposes."

In this action, also, the defendant stockholders demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action as against them, and appeal from an order overruling the demurrer.

We only need to consider the effect to be given to the clause "buying, selling, leasing, and dealing in mineral lands for the above purposes." Appellants contend that the "buying, selling, leasing, and dealing" here contemplated is for the purpose of carrying on mining operations on the land by the defendant company, and as incidental to such mining operations. We cannot agree with appellants. We can see how a mining company might, as incidental to the mining business, buy mineral lands for the purpose of operating mines upon them, and sell them after the mines were exhausted. But this is not the meaning of the clause in question, and, though somewhat awkwardly worded, its meaning evidently is that the corporation may buy, sell, lease, and deal in mineral lands, which are so bought, sold, leased, and dealt in for the purpose of having some one mine them. In other words, the corporation may, as a part of its general business, speculate in mineral lands. This being so, the case is quite similar in principle to that of First Nat. Bank v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997, and cases cited.

Then the defendant company is not an exclusively mechanical corporation, such that its stockholders would be exempt under the rule laid down in Cowling v. Zenith Iron Co., supra, and the defendant stockholders are subject to the "double liability." It is true that the articles of incorporation here in question are no broader than is au-

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thorized by G. S. 1894, § 2827, and that section 2829 declares that a corporation so organized "shall be deemed to exist * * * as a manufacturing and mechanical corporation under the constitution and laws of this state." But the very purpose of the constitutional amendment was to prevent the legislature from exempting the stockholders of such corporations as this from liability; and, so far as section 2829 contravenes the constitution, we must hold it void.

The other questions involved in this case are disposed of in the Cowling Case.

The order overruling the demurrer is sustained.

CHRISTOPHER H. SMITH, Insurance Commissioner, and Another v. NATIONAL CREDIT INSURANCE COMPANY and Others.[1]

65 283
s72 367
72 369
65 283
s78 215
65 283
s79 487

June 24, 1896.

Nos. 10,122, 10,123, 10,124, 10,125, 10,126—(312, 313, 314, 315, 316).

Finding Sustained.

Held, the court below did not err in allowing the claim of the plaintiff policy holder.

Credit Insurance—Assignment by Insurer for Benefit of Creditors—Policy Construed—Unearned Premium.

The defendant insurance company was engaged in the business of insuring or indemnifying mercantile concerns against "excess losses" caused by the failure or insolvency of customers to whom such concerns had made sales on credit, which excess losses were ascertained by deducting from the actual losses 15 per cent. thereof, and also one per cent. of the total year's sales, to be not less than a stipulated amount. The firm of A. & M. took out such a policy, to run for one year, in which it was stipulated that the year's sales on which the one per cent. was to be computed should not be less than $90,000. When the policy had run ten months and seven days the insurer, being insolvent, made an assignment for the benefit of its creditors. *Held*, such assignment terminated the policy. During the ten months and seven days which the policy ran, the total amount of sales of the insured was $75,000, and no more. For the purpose of determining the excess loss, *held*, the one per cent. should be computed on this amount, and not

[1] Reported in 68 N. W. 28.

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on the $90,000 aforesaid. *Held*, further, the insured were also entitled to recover back the unearned premium for the balance of the year after the assignment.

Same—Losses after Assignment—Funds in Hands of Insurance Commissioner.

B. took out a similar policy, which had run but a part of the year for which it was taken out when the insurer assigned as aforesaid. During this time, B. did not suffer a sufficient amount of loss to enable him to recover for the same under the policy; but, during the whole year for which the policy was issued, he did. *Held*, he is not entitled, as against the funds in the hands of the insurance commissioner, deposited under G. S. 1894, § 3332, to treat the insurer as a going concern for the balance of the year, so as to recover for losses occurring subsequent to the assignment.

Same—Recovery of Premium Where no Loss.

The D. corporation took out a similar policy, which ran also but a part of the year, when the insurer assigned as aforesaid. During this time the insured suffered no loss. *Held*, it was not entitled to rescind the contract and recover back the whole premium paid, and was only entitled to recover back the unearned premium for the balance of the year subsequent to the assignment.

Same—Proof of Loss.

The policy of the A. Co. ran the full year for which it was issued, and nine days thereafter the insurer assigned as aforesaid. By the terms of the policy the insured was barred from recovering on the policy unless it made final proof of its year's losses within 30 days after the expiration of the year, which it failed to do. *Held*, the assignment was a breach of the contract, and the insured was entitled to recover on a quantum meruit without furnishing such proof of loss.

Same—Unearned Premium—Funds in Hands of Commissioner.

Policy holders having claims for unearned premiums are entitled to participate in the funds in the hands of the insurance commissioner.

Appeal by each of the parties to the action from an order of the district court for Hennepin county, Belden, J., denying motions for a new trial. Affirmed.

Fletcher, Cairns & Rockwood, for appellant the Kentucky Jeans Clothing Company.

The creditors of the company who come within the definition of the words "policy holders" as used in G. S. 1894, § 3332, have a vested right in the fund as a security to the exclusion of all other creditors of the

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company. Lancashire Ins. Co. v. Maxwell, 131 N. Y. 286, 30 N. E. 192. The term "policy holders" in the statute means those between whom and the company the relation of insured and insurer exists; and when that relation ceases, the right to make any claim to the fund deposited in accordance with the statute ceases. That relation ceases when the company becomes insolvent. Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772; In re Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921. The uniform rule is to allow for a return of the unearned premium. It is an allowance for money for which no consideration is received and depends upon the legal fact of the termination of the policy. People v. Security L. I. & A. Co., 78 N. Y. 114. Under the terms of the policy, which are controlling, no allowance can be made as for a loss until the full term of the policy has elapsed. The only practical and equitable method is to select the point of time of legal insolvency from which to adjust the respective rights of all the creditors among themselves. The only other permissible point of time would be the date of the commencement of this action. Taylor v. North Star Mut. Ins. Co., supra; Commonwealth v. American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660. Proof of loss, as provided by the policy, is necessary.

John F. Byers, for appellants Allen & Marvin.

The company being insolvent, all policy holders are creditors of the company to the amount of unearned premiums. This court has adopted the general rule in making such unearned premiums the measure of damages for the breach of its contract on the part of the company. Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772; In re Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921. Losses occurring after the insolvency of the company cannot be treated as claims against it. Taylor v. North Star Mut. Ins. Co., supra; Doane v. Milville Mut. M. & F. Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739; Dean's Appeal, 98 Pa. St. 101; Commonwealth v. Massachusetts Mut. F. Ins. Co., 119 Mass. 45. No loss under the policy can occur until the losses incurred in the business exceed the percentage stated upon the total amount of business to be done within the term of the policy. The equities are to be determined as they exist at the date of the insolvency of the company, which is the date upon which it made its assignment. St. Paul & M. Trust Co. v. Leck, 57 Minn. 87, 58 N. W. 826.

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Rea, Hubachek & Healy, for appellants Brown, Detroit Copper & Brass Rolling Mills, and Acme Worsted Company.

The distribution of the fund should not be governed by the rules laid down in insolvency cases, for the reason that the fund is not subject to the assignment in insolvency. The fund was deposited with plaintiff before the assignment, pursuant to G. S. 1894, § 3332, "in trust for the benefit of all policy holders," and hence did not pass by the assignment. To the extent of this fund, the company may be treated by its policy holders as still a going concern, and the policy holders may elect to treat their policies as in force, and recover such loss as may accrue at their termination; or they may treat the policy as broken by the assignment and recover back the whole premium. If the policy holder elects to treat his policy as in force, he is entitled to share in the fund to the full extent of the loss; if he elects to treat the policy as broken, he is entitled to recover back the whole premium. The contract of insurance is entire and not severable. Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457; Kohn v. Fandel, 29 Minn. 470, 13 N. W. 904; McGrath v. Cannon, 55 Minn. 457, 57 N. W. 150.

Victor J. Welch and *Henry Conlin*, for appellant Hayne, Receiver.

The policy holders are all creditors of the insolvent company. State v. Security Life Ins. Co., 71 N. Y. 114. The effect of an adjudication of insolvency of an insurance company is to terminate all contracts of insurance. Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

Fifield & Fifield and *Henry J. Fletcher*, for sundry policy holders.

CANTY, J. The defendant National Credit Insurance Company is a corporation which was engaged in the business of insuring and indemnifying business men and mercantile concerns against "excess losses"; that is, losses beyond a certain per cent. or amount of loss incurred in their business by reason of the failure or insolvency of customers to whom they sold goods on credit. The defendant company was organized under the laws of this state in 1891, and amended its articles several times during the years 1892, 1893, and 1894. On September 10, 1895, being then wholly insolvent, it made an assignment,

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under the insolvency law of 1881,[2] to the defendants Hayne and Fuller, for the benefit of its creditors. Shortly after its organization, the defendant company deposited with the insurance commissioner of this state, for the security of the policy holders, pursuant to the statute, certain bonds, stocks, and other securities, of the aggregate face value of $100,000.

This action is brought by the insurance commissioner and one of the company's policy holders, as joint plaintiffs, to have its assets in the hands of the insurance commissioner and its assets in the hands of its said assignee marshaled and distributed among its creditor policy holders. In the court below the parties brought on for hearing, and for allowance or disallowance, the five claims of five such creditors, each claim belonging to a different class, and stipulated the facts as to such claim, for the purpose, it would seem, of testing the respective rights of the different classes. The court below allowed each of these claims for some amount, and from an order denying a new trial all parties appeal.

1. The first of these claims is that of the plaintiff the Kentucky Jeans Clothing Company. It is found by the court below that all of the allegations of the complaint are true, from which it appears that the clothing company held a policy (or bond of indemnity) which ran for one year, and the year had expired several months before the insurance company failed; that the clothing company suffered losses for which, under its said policy, it was entitled to be indemnified in the sum of $1,801; and that this was the amount for which its claim was adjusted and allowed by the insurance company itself before its failure. The court allowed the claim for the same amount, and no reason is suggested for disturbing that allowance.

2. The next claim is that of Allen & Marvin, as to which it is stipulated as follows:

"It is stipulated as to the defendants Allen & Marvin that a policy similar to the one in the complaint was issued to them on November 3, 1894, to run one year, for which they paid a premium of $145, by which said defendants were insured to an amount not exceeding $5,000, to cover losses in excess of one per cent. of not less than $90,000 annual sales and deliveries; that the conditions of said bond were in all other respects identical with those men-

[2] Chapter 148.

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tioned in the complaint; that prior to the insolvency of the insurance company the defendants sold and delivered goods, within the terms of the policy, to the extent of $75,000, and suffered losses upon such sales to the amount of $1,535. Due notices of said losses were given to the company, and a final proof thereof was duly served upon the assignees of the company on December 1, 1895."

By reference to the policy set out in the complaint, it would seem that the Allen & Marvin policy provides that if they "suffered losses over and above one per cent. of not less than $90,000 annual sales and deliveries made during the period" of the policy, the insurance company "will indemnify" them "against such excess losses, not to exceed the sum of $5,000, save such sum or sums as shall be deducted therefrom as hereinafter provided." The policy further provided: "Fifteen per cent. shall be deducted from the total gross losses as covered by this bond [policy], in consideration of which said losses to remain the property of said second party."

The policy did not run a year, or any longer than ten months and seven days, before the insurer failed, and made an assignment for the benefit of its creditors. The court held that such assignment canceled the policy for the balance of the time it had to run, and that there was due Allen & Marvin $21.35 as unearned premium, and was also due them "the further sum of $1,535.00, less fifteen per cent. thereof, and less the further sum of $900, being one per cent. of not less than $90,000 annual sales"; leaving as the sum so due $404.75, which, with the $21.35, amounts to $426.10.

Counsel for Allen & Marvin make no objection to this, but content themselves with objecting to the orders of the court as to some of the other claims. However, counsel for other creditors having claims similar to that of Allen & Marvin, have filed a brief in which they assert that the latter claim was to be a test claim; and they assail the court's order as to the latter claim so far as it holds that, in determining the excess loss, one per cent. of the $90,000 should be deducted. Counsel contend that only one per cent. of a part of the $90,000 should be deducted, and that such part should be equal to the part of a year which the policy ran before the failure of the insurer. We cannot hold that the $90,000 should be so apportioned. Very many wholesale concerns, such as these, make a very much larger amount of sales during one part of the year than during an-

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other part; and it would be unfair to them thus to arbitrarily divide the year's minimum loss, for which they are not to be indemnified.

But we are also of the opinion that the court erred in holding that, in determining the excess loss, one per cent. of the whole $90,000 should be deducted. The insolvency of the insurer, and the assignment by it for the benefit of its creditors, had the effect of canceling the policy. 1 Wood, Ins. § 147. See, also, In re Minneapolis M. F. Ins. Co., 49 Minn. 291, 51 N. W. 921; Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772. Then the insurer broke his contract, and terminated the same, before the end of the time allotted to the insured in which to make the $90,000 of sales. Under the circumstances, it is wholly inequitable to consider the $90,000 at all, in determining the amount of such excess loss. During the ten months and seven days in which the policy ran, the insured made sales to the amount of $75,000, and this is the amount on which the one per cent. should be computed. Where one party commits a breach of such a contract, thereby terminating it, the other party may, as a general rule, recover on a quantum meruit which adopts the analogy of the contract as far as applicable, just and reasonable, but no further. In determining the excess loss for which Allen & Marvin should be indemnified, they should be allowed the amount of the $1,535, less 15 per cent. of the same, and less also the further sum of one per cent. of $75,000, which gives as the sum due $554.75, instead of the $404.75 allowed by the court below. But, as Allen & Marvin themselves raise no question about the amount allowed them, the order of the court below will not be disturbed.

3. The next claim is that of the defendant Brown, whose policy, similar in form, commenced to run October 18, 1894, and had run ten months and twenty-two days when the insurer failed. During this time Brown had suffered losses, but, after deducting 15 per cent. of the same, the balance did not amount to one per cent. of his sales during the same period of time; so that he is not entitled to recover for such losses, unless he can include with them subsequent losses occurring during the balance of the year for which his policy was issued. This he contends he is entitled to do, at least as against the fund in the hands of the insurance commissioner.

G. S. 1894, § 3332, requires such an insurance company as this to deposit with that officer securities aggregating in value $100,000, "in

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trust for the benefit of all policy holders." Counsel contends that, as to this fund, Brown might treat the insurance company as a going concern until his policy expired. It is undoubtedly true that an insurance company which is not insolvent cannot lie down, abdicate its functions, and thereby escape future liability on its existing contracts. But when it is insolvent it is its duty to lie down and make an assignment, as it has done in this case; and, having done so, its funds belong to its creditors as their claims then exist. If, after such assignment, insurance risks are to be longer carried, they must in fact be carried by the creditors, not by the insurance company, which has become wholly irresponsible. But the court has no right to compel the creditors to continue the insurance business, or to surrender up for that purpose the funds on hand. And it is wholly immaterial whether those funds are in the hands of the assignee in insolvency, or in the hands of the insurance commissioner. They are in each case equally the funds of the creditors. The court did not err in allowing Brown nothing but the balance of the premium paid and unearned at the time of the assignment.

4. The next claim is that of the Detroit Copper & Brass Rolling Mills, whose policy, issued for a year, had run but ten months and twenty-six days at the time of the assignment. It had suffered no loss during this time, and the court allowed its claim for the unearned premium for the balance of the time. We cannot hold that, as urged by its counsel, this policy holder had a right to elect to rescind the contract and recover back the whole premium after the insurer had partly performed the contract by incurring risk on the policy for more than ten months. The order of the court as to this claim should be affirmed.

5. The next claim is that of the Acme Worsted Company. As to it, it is stipulated:

"That a policy was issued to it, similar to that mentioned in the complaint, on September 1, 1894, running for one year, and that it suffered a net loss, within the terms of said policy, after deducting all sums provided for, in the sum of $100, and that no final proof of loss was ever made to the company or its assignees, but due notices of all losses were given to the company as they occurred."

The policy in question provides that within ten days after receiving notice of any loss the insured shall notify the insurer thereof. It further provides:

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"The final proof of loss shall be made to said first party, at home office of the company, within thirty (30) days after the expiration of this bond [policy] * * * And it is understood and agreed that all claims under this bond are forever barred unless such final proof of loss shall be made and forwarded to said first party within thirty (30) days after the expiration of this bond [policy]."

It will be observed that the policy of this claimant ran the full year, which expired nine days before the assignment, while the time to file such final proof of loss did not expire until 21 days after the assignment.

The question thus presented is whether the failure of the worsted company to make such final proof precludes it from participating in the distribution of the assets. We are of the opinion that it does not. The insured had a right to consider the insolvency and assignment of the insurer a breach of the contract on its part. At the time of that breach the insured was not itself in default. Although the year had run before any breach on the part of the insurer, still the contract remained executory on both sides. The insured, to perform on its part, must furnish the proof of loss; and the insurer, to perform on its part, must pay the loss. Perhaps the insured was still entitled to perform fully, and bring an action against the insolvent insurer for the full amount of the loss. But as against the assignee and the sequestered assets, including those in the hands of the insurance commissioner, it is only entitled to recover on a quantum meruit for what it had performed up to the time of the assignment.

When the assignment is made, the day of liquidation has arrived, whether the contract is fully or only partially performed. As neither the assignee nor the insolvent can ever perform fully on his part, he is not in a position to demand further performance from the other party. Where it is for the benefit of the insolvent estate that the assignee fully perform, he may give the other party notice that he will do so, and insist on performance by such other party. See Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 53, 59 N. W. 879. Thus, where goods sold on credit are to be delivered in instalments, and after part are delivered the buyer becomes insolvent, the seller may refuse to deliver the balance of the goods until the price (not yet due) of those already delivered, and the price of the balance to be delivered, are all tendered to him. Leake, Cont. 656; Benjamin, Sales (6th Ed.) p. 738, § 759a. But it is not for the benefit of the insolvent estate to

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adopt and perform the contract here in question, and the assignee has not offered to do so. Then, as before stated, the worsted company is only entitled to recover on a quantum meruit for a breach of the contract. But the measure of its damages is substantially the same as if it had fully performed by furnishing the final proof of loss before the assignment. The difference is a merely nominal sum, and we will not reverse the order of the lower court for such difference. The rule de minimis must be applied. Singer Mnfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 23; Palmer v. Degan, 58 Minn. 505, 60 N. W. 342.

6. There is nothing in the point that the policy holders are not entitled to participate in the funds in the hands of the insurance commissioner on their claims for unearned premiums.

This disposes of the case, and the orders appealed from are all affirmed.

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FRANK L. JANEWAY v. CITY OF DULUTH and Others.[1]

June 24, 1896.

Nos. 10,143—(323).

City of Duluth—Water and Light Bonds—Special Election—Validity of Ballots.

In an action to enjoin the city officers of Duluth from issuing "water and light" bonds pursuant to a special election held under the charter, *held*:

1. The ballot was not so complex and misleading that the election was void.

2. The placing of the words "Yes" and "No" after the proposition to be voted on was legal. Truelsen v. City of Duluth, 61 Minn. 48, followed.

3. The city may, under the charter, issue such bonds to erect a water plant alone.

4. The question of the necessity of erecting such a water plant when the city is already adequately supplied by another water plant owned by a private corporation is a legislative question, and not for the courts.

Same—Irregularities in Election.

Certain irregularities alleged *held* not sufficient to avoid the election, it not appearing that they changed the result.

[1] Reported in 68 N. W. 24.

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Complaint Insufficient.

Held, the complaint does not state facts sufficient to constitute a cause of action.

Appeal by plaintiff from an order of the district court for St. Louis county, Moer, J., sustaining a demurrer to the complaint. Affirmed.

Schmidt, Reynolds & Mitchell, for appellant.

J. W. Bull, pro se, by leave of court, in behalf of appellant.

Ellsworth Benham and *S. T. & Wm. Harrison*, for respondents.

CANTY, J. This is an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

Plaintiff brings this action as a taxpayer. The complaint alleges: That on August 12, 1895, the city council of Duluth passed an ordinance calling a special election to be held on September 24, 1895, for the purpose of voting on the proposition of authorizing the city council to issue water and light bonds to buy or build a water plant for said city, and that the ballot authorized to be used, and which was so used, is in the following form:

CITY BALLOT.

Put a cross mark (X) opposite the word "Yes" standing opposite each proposition which you wish to vote for, and a cross mark opposite the word "No" standing opposite each proposition which you wish to vote against, in the squares indicated by the arrow.		↓
1. Upon the proposition of issuing water and light bonds, to the extent of eighteen hundred fifty-six thousand (1,856,000) dollars for the purpose of erecting or purchasing a water plant.	Yes No	
2. Upon the proposition of expending the moneys derived from the sale of said bonds in purchasing a water plant already in existence in the city of Duluth; said bonds to be issued and sold by the common council as the same may be needed to pay for said plant, or to discharge or take up the bonded indebtedness of said plant.	Yes No	
3. Upon the proposition of expending the moneys derived from the sale of said bonds in erecting a water plant, said bonds to be issued and sold by the common council as the same may be needed for that purpose.	Yes No	
4. Upon the proposition that, in the event the voters at this election shall declare in favor of purchasing a water plant already in existence in the city of Duluth, additional water and light bonds to the extent of eight hundred fifty thousand (850,000) dollars shall be issued for the purpose of extending and improving said plant; said bonds to be issued and sold by the common council as the same may be needed for said purpose.	Yes No	

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—That said election was held accordingly, and the votes were canvassed by the city council, which declared that 4,210 votes were cast in favor of proposition 1, and 438 votes against it; that 1,556 votes were cast in favor of proposition 2, and 2,667 against it; that 3,237 votes were cast in favor of proposition 3, and 1,077 against it; and that 1,798 votes were cast in favor of proposition 4, and 2,442 against it. That the total number of votes cast at the election was 4,902.

The provisions of the city charter authorizing these proceedings are recited in the opinion in Truelsen v. City of Duluth, 61 Minn. 48, 63 N. W. 714, in which case a former election on somewhat similar propositions was declared void. It is further alleged in the complaint herein that on December 2, 1895, the city council passed another ordinance providing for issuing such bonds to the aggregate amount of $750,000, and directing the city clerk to advertise for sealed proposals for the purchase of the same; that the city clerk did so, and a proposal was received from one Hartman for all of said bonds at par and accrued interest; and thereupon the city council by resolution adopted such bid, and is proceeding to have said bonds lithographed, executed, and issued to said Hartman. Plaintiff prays that the city and its officers be enjoined from issuing the bonds.

1. We cannot hold, as contended by appellant, that the ballot is so complex and misleading as to make the election void; and no good reason is urged for so holding.

2. The claim that the election is void because the words "Yes" and "No" are printed in the ballot after each proposition is disposed of in the case of Truelsen v. City of Duluth, supra.

3. Neither is there anything in the claim that the city cannot, under the charter, issue bonds to build a water plant alone. While the charter calls them "water and light bonds," it clearly provides, by the separate propositions to be voted on, for the issuing of these bonds for building one kind of a plant without also building the other.

4. It is alleged in the complaint that there is no necessity for a new water plant; that the present plant, owned by a private corporation, is adequate and sufficient for the needs of the city and its people, and that the new plant will entail needless expense on the taxpayers. Whether or not a new water plant is necessary is a leg-

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islative question, not a judicial one. The court cannot substitute its judgment for that of the city council and the voters of the city.

5. It is alleged in the complaint in the most general terms that there were irregularities in conducting the election; that the judges of election were not selected from the different political parties, but were appointed without regard to party lines, and in many instances all the judges at a polling place were appointed from the same political party; that no proper registration was had prior to the election, and that in many instances the judges of election abandoned their posts, and electioneered in favor of proposition 3, and engaged in such electioneering even in the booths, "and that such electioneering on the part of such judges materially affected the result of said election." But it is not alleged in what manner it affected the result. Neither is it averred that the irregularities changed the result of the election. But, even if it were so alleged, we are not ready to concede that these questions can be raised, and the election set aside, in an action like this, while the statute gives a specific remedy for contesting the election. It appears by the complaint that proposition 3 received a majority of all the votes cast at the election, as well as a majority of all the votes cast on that proposition, and was carried.

No sufficient reason is urged why the result should not be carried into effect. We are therefore of the opinion that the order appealed from should be affirmed.

JOSEPHINE M. SMITH v. CITY OF ST. PAUL.[1]

June 25, 1896.

Nos. 9988—(221).

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s69 277

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572 473

Condemnation Proceedings—Action to Recover Award—Intervention by Claimant.

Where an action is brought against the city of St. Paul to recover the award made as damages for taking property for a public use, a third party, who claims to have been the owner of the property taken, or of a part of it, and hence entitled to the award, or part of it, may come in as a party to the action, and assert his claim.

[1] Reported in 68 N. W. 32.

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Appeal by plaintiff from an order of the district court for Ramsey county, Brill, J., overruling the demurrers of plaintiff to the complaints in intervention of St. Paul Trust Company and Lucretia F. Sache. Affirmed.

H. V. Rutherford and *Smith, Shedd, Underwood & Hall*, for appellant.

Harvey Officer and *Walter L. Chapin*, for respondents, intervenors.

MITCHELL, J. The city of St. Paul had taken by condemnation proceedings a tract of land for the purpose of opening a street, the compensation or damages awarded being one gross sum for the entire tract. The plaintiff brought this action against the city to recover the amount of the award, alleging that she was the owner of the entire tract. The St. Paul Trust Company and Mrs. Sache interposed "complaints in intervention," alleging that they respectively owned certain portions of the tract, and hence were severally entitled to a part of the award. To these complaints the plaintiff demurred on the ground that the facts stated did not constitute a ground of intervention. This appeal is from an order overruling the demurrers.

The contention of the plaintiff is that these parties had no right to intervene, under G. S. 1894, § 5273, for the reason that they "would neither gain nor lose by the direct legal operation and effect of the judgment"; that any interest they might have in the property, or any claim they might have against the city, would be wholly unaffected by the result of a suit between the city and the plaintiff. Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586. If the action had been brought by plaintiff to recover an ordinary debt alleged to be due her from the city, or if the intervenors had to rely exclusively upon the statute for their right to come into the action, the plaintiff's contention might be difficult to answer. But compulsory interpleading and voluntary intervention in an action originally between other parties were always known and recognized as ancillary remedies by means of which courts were enabled more conveniently and perfectly to adjudicate upon the ultimate rights of the parties in the subject-matter involved in the litigation, and thus award full and final relief in the further judicial proceedings to which these remedies were auxiliary. It is not to be supposed that the statute in relation to interpleader and intervention was intended to abolish those ancillary remedies in cases

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where they were previously authorized, and to limit them exclusively to cases falling strictly within the terms of the statute.

Condemnation proceedings under the city charter are in rem against the land. The award becomes a fund standing in the place of the land, and whoever owns the land is entitled to the award. If the award is paid over to one as owner who is not the true owner, he will be liable to the true owner in an action for money had and received. Lewis, Em. Dom. § 627; Tamm v. Kellogg, 49 Mo. 118; Meginnis v. Nunamaker, 64 Pa. St. 374; Harris v. Howes, 75 Me. 436; In re Eleventh Ave., 81 N. Y. 436. Hence, if the whole of the award should be paid over to the plaintiff, and the fact should be that she was not entitled to the whole of it, but that the intervenors were severally entitled to a part of it, they could maintain actions against her to recover their shares. The fact that they might, at their election, have a remedy against the city, would not deprive them of this right of action. If this is so, why may they not intervene in this action, in order to have the award apportioned, and to recover their share? Why should they have to wait until the money was paid over to the plaintiff, and then sue her? Where the duty is devolved on the court or other tribunal before which the condemnation proceedings were had, to distribute or apportion the award among those entitled to it, there is no question of the right of any claimant to appear and assert his right to it, or of the court or other tribunal to require any such claimant to appear and establish his claim.

We do not think that the fact that the statute gives a party a right of action against the city to recover the amount of the award at all alters the rule. The question before the court still is, who are entitled to the award? Doubtless the city might, in a proper case, require the plaintiff and other claimants to interplead; but if it appeared that a third party claimed a portion of the award, the court would, in our opinion, have the power to require such person to be brought in as a party to the action, in order that there might be a full and final adjudication of the rights of all parties in the fund; and, if such a person can be thus brought in, there is no reason why he may not be allowed to come in voluntarily. The court, in such case, is not called on to assess the property, but merely to apportion and divide what has been assessed among the different parties according to their respective interests in the property. Awards are

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often made in gross, and the division made afterwards, according to ownerships.

It is not important to consider whether, in this case, there should have been separate awards, for by claiming under the award all parties have ratified it, and waived the irregularity, if any. The fact, if it be a fact, that by reason of the judgment in a prior action between the plaintiff and the city it has become res adjudicata between them that the plaintiff was the owner of the whole of the tract taken, can have no effect upon the rights of the intervenors, who were not parties to that action.

Order affirmed.

STATE OF MINNESOTA ex rel. VERNON BELL v. CITY COUNCIL OF THE CITY OF MINNEAPOLIS.[1]

June 25, 1896.

Nos. 10,005—(228).

Special Assessments—Extension of Time of Payment—Laws 1895, c. 236.

The provisions of Laws 1895, c. 236, entitled "An act to authorize the extending of the time of payment of assessments for local improvements by cities," etc., are permissive, and not mandatory.

Appeal by relator from an order of the district court for Hennepin county, Smith, J. Affirmed.

Paige & Paige and *Judson L. Wicks*, for appellant.

David F. Simpson, for respondent.

MITCHELL, J. This appeal is from an order denying a motion for a peremptory writ of mandamus to compel the city council of the city of Minneapolis to extend the time of payment of assessments on the relator's property for local improvements, as authorized by Laws 1895, c. 236. Assuming, without deciding, that this act applies to cities organized under special charters, and that the act is valid, the writ was properly denied, for the reason that the provisions of the act relating to such extensions are merely permissive, and not mandatory upon the city council.

[1] Reported in 68 N. W. 31.

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There is no universal rule by which to determine whether the provisions of a statute are mandatory, or merely directory or permissive, except that that exposition should be adopted, in this as in other cases, which carries into effect the true intent of the legislature. To ascertain that intent, regard must be had to the language and the subject-matter of the act, and the object intended to be secured by it.

The primary and main object of this act, manifestly, was to authorize city councils to grant relief to those whose property had been assessed for local improvements, by extending the time of payment. While, in connection with and as incidental to this, certain provisions were incorporated in the act for the protection and benefit of the public, yet the interest of the public was neither the moving cause nor the primary purpose of the enactment of the statute. Moreover, the relief to property holders which the law provided for was a mere gratuity, and not anything to which they had either a legal or moral right.

The word "authorize," twice used in the title, is significant that its provisions were not intended to be mandatory. When used in reference to the issuance of certificates of indebtedness, that word is clearly only permissive, and the presumption is that it was used in the same sense in reference to the extension of the time for paying assessments. In the body of the act it will be observed that the legislature has in every instance used the words "may" and "shall," in such a manner as to clearly show an intention to give to each its common meaning. The word "may" is always used with reference to the granting of the extension, while the word "shall" is uniformly used with reference to the conditions on which it is to be granted, as well as the acts to be performed by different officials, including the city council, after the extension has been granted. The word "grant," as used in reference to the extension, is itself strongly indicative of a legislative intent that the act should be merely permissive. The word "right," as used in the proviso to the first section, is indicative of the same intent.

The fact that the act commits the subject of granting extensions to a legislative body using legislative discretion is also strongly indicative of a like intent. If the provisions of the act were intended to be mandatory, the legislature would more naturally have granted the extension itself, and provided for its being carried into effect by min-

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isterial officers. The fact that the act only applies to assessments made before its passage, and therefore designed only to meet some special existing conditions, also indicates that it was designed to give the city councils a legislative discretion in meeting these conditions. The legislature must be presumed to have known that these temporary conditions did not exist uniformly in every city in the state. Special assessments are made in different cities under different laws. The amount of such assessments differs in different cities. In some cities provision is already made for dividing them into partial payments; in others there is no such provision. In some cities such provisions are adequate, and in others inadequate. Therefore in some cities there might be a necessity for some such relief as was authorized by this act, while in others there might be none. Knowing and having in mind these varied conditions in different cities, it is much more reasonable to assume that the law was designed to give the legislative branch of the city government authority to grant relief, if in their opinion it was required, than that the extension should be forced on every city, without regard to whether it was needed or not. If there ever was an act where "may" should be construed as meaning "may," and not "must," this certainly is the one.

Order affirmed.

J. D. MORAN MANUFACTURING AND CONSTRUCTION COMPANY v. CITY OF ST. PAUL.[1]

June 26, 1896.

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Nos. 9899—(183).

Contract—Construction—Interest.

A contract between the parties hereto provided that the plaintiff should be paid a stated gross sum for building certain sewers on the completion and acceptance of the work. It also provided for the granting of estimates during the progress of the work, and for paying the same when there was money in the treasury applicable to the payment of such work; but no interest was to be allowed on them. During the progress of the work, estimates were allowed, but no warrants were issued therefor, or anything paid thereon until after the work was completed and accepted, and the amount

[1] Reported in 67 N. W. 1000.

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due therefor allowed, when warrants were issued from time to time, and paid to the amount of the respective estimates. *Held*, that the sums paid on such warrants were payments pro tanto on the debt then due as an entirety, and that the plaintiff is entitled to interest on his debt, including the amount of the estimates from the date of the completion and acceptance of the work.

Appeal by defendant from an order of the district court for Ramsey county, Willis, J., denying a motion for a new trial. Affirmed.

E. J. Darragh and *Hermon W. Phillips*, for appellant.

Warren H. Mead, for respondent.

START, C. J. On March 29, 1893, the parties hereto entered into a written contract whereby the plaintiff agreed to furnish the materials and construct certain sewers in the streets of the defendant city, for which it promised to pay the plaintiff the sum of $20,000. It paid thereon instalments between August 15, 1893, and June 28, 1895, inclusive, the sum of $19,900. This action is for the recovery of the balance of principal and interest claimed to be due on the contract. The defendant, by its answer, admits the contract and its performance, but claims that the plaintiff is not entitled to interest, and tenders it judgment for $100. The trial court sustained the claim for interest, and directed judgment for the plaintiff for $725, and the defendant appealed from an order denying its motion for a new trial.

The only question in the case is whether the plaintiff was legally entitled to interest on the claim, and, if so, from what date. An answer to this question involves a construction of the contract of the parties. The contract provided that the work should be completed on or before August 31, 1893, to the acceptance and satisfaction of the board of public works of the city. So much of the contract as relates to the time and manner of payment for the work is in these words:

"First. In case the said party of the first part shall proceed to properly perform and complete the said work hereby agreed to be done, and all the provisions, clauses, matters, and things in this agreement contained, the said board of public works may, from time to time, as the said work progresses, grant to the said party of the first part, every month, an estimate of the amount already earned, reserving, however, 15 per cent. therefrom; and thereupon said party of the first part shall be entitled to receive the amount which may be due

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thereon (reserving said 15 per cent.), when the money applicable to the payment of such work shall be in the city treasury.

"Second. When the said party of the first part shall have wholly and finally completed all of said work to the satisfaction of the said board of public works, the amount or balance due said party of the first part on said work, including said reserve of 15 per cent., shall be audited and allowed by the common council of the city of St. Paul. All of which shall be payable out of the fund collected upon the assessment of said improvement. It is expressly understood that interest will not be allowed or paid upon any of the estimates granted under this contract."

It is clear from the terms of this contract that when the work is finally completed to the satisfaction of the board of public works, and the balance due the plaintiff on the work is audited and allowed, the whole contract price then remaining unpaid is due and payable out of the fund collected upon the assessment for the improvement. This provision as to the fund from which the contract price is to be paid does not qualify the time of payment. It is not payable when the fund is collected, but out of the fund collected. The plaintiff's claim was due as soon as it was audited and allowed, and it is entitled to interest thereon after it became due until it is paid, unless there is some provision in the contract which takes this case out of the general rule.

The defendant claims that the clause in the contract as to interest on estimates disentitles the plaintiff to interest. The contract is to be construed in reference to the provisions of the city charter as to local improvements and special assessments to pay for the same. It is sufficient to state, without giving details, that the city had at its command the necessary legal machinery whereby it could have collected the assessment for this improvement by the time it was completed and accepted. In view of this fact it is not a forced construction of the contract to hold that it assumes that the fund will be collected by the time the work is completed and accepted, but that it was a matter of uncertainty whether any of it would be collected before that time. This is the fair inference from the words used. If this is so, then there is no trouble in determining the meaning of the stipulation to the effect that interest will not be paid on any estimates granted under the contract. Now, the only estimates provided for by the contract are such only as the board of public works might, from time to time, during the progress of the work, grant to the plain-

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tiff. Such estimates were discretionary with the city officers in charge of the improvement, and were intended to enable the contractor to obtain a part of its money before the contract price was due, if the money applicable to the payment of such work should be in the city treasury; if not, then by raising the money on the credit of what the city had certified would be due when the contract was completed. Hence the contract provided that no interest would be allowed on any estimates given during the progress of the work; that is, before the contract was completed and the stipulated price was due. But when, as in this case, nothing was paid on any of the estimates or upon the contract until after the work was completed, and the balance due was audited and allowed, the sums called for by the estimates were still a part of the amount due on the contract, and interest is recoverable on the whole thereof from the time it was due until it is paid.

No question is or can be made in this case as to the sufficiency of the fund at the time the action was commenced to pay both principal and interest due on the contract, for on November 15, 1893, the property benefited by the improvement was sold on a tax judgment, and a sum, with what had been previously paid, realized, more than sufficient to pay the plaintiff's entire claim, principal and interest. If, therefore, the claim of the city that it ought not to pay this interest is supported by any equity, it is not apparent from the record. The fact that the city was a purchaser of a part of the property does not affect the equities of the case, for it received on such sale certificates bearing interest at the rate of 12 per cent. per annum.

The work in question was completed August 11, 1893, to the satisfaction and acceptance of the city, and thereupon the plaintiff duly demanded the contract price therefor. During the progress of the work three estimates were allowed, but no warrants were issued or payments made therefor until after the completion of the work when warrants were issued to the amount of such estimates, dated, respectively, August 15, August 26, and September 12, 1893, and paid. Subsequently, and between September 13, 1893, and June 28, 1895, inclusive, 10 warrants were issued for various amounts, and paid. The aggregate amount of all of these warrants is $19,900. The defendant claims that all of them were issued on estimates on which the plaintiff was not entitled to interest by the terms of the contract; and, fur-

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ther, that each separate estimate was a separate demand or debt against the city, and, the principal thereof having been paid by the warrant, no action can be maintained for the interest, invoking the rule that interest is an incident to the debt, and, that being paid, no action lies for the recovery of the interest. There was but one debt in this case, which was the principal sum of $20,000, due to the plaintiff by virtue of its contract, and each warrant paid was simply a payment pro tanto on this debt as an entirety. The city cannot subdivide its debt, calling its payments estimates, and the latter separate debts, and thereby avoid paying interest on an admitted and honest debt, long past due.

Order affirmed.

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AMES & FROST COMPANY v. ERNEST F. SMITH and Another.[1]

June 26, 1896.

Nos. 9989—(198).

Action on Note—Proof of Ownership.

The possession of a promissory note by the payee with his own indorsement in blank thereon is prima facie evidence of his ownership of it.

Sale—Contract by Letter.

To establish a contract for the sale of property by the letters of the parties, it must appear that there was a clear accession on both sides to one and the same set of terms. The evidence herein considered, and *held*, that it does not establish a contract between the parties within this rule.

Appeal by defendants from a judgment of the district court for Hennepin county, in favor of plaintiff for $1,003.38, entered in pursuance of the findings and order of Russell, J. Affirmed.

Henry M. Farnam, for appellants

Haynes & Chase and *Bangs, Wood & Bangs*, for respondent.

START, C. J. The complaint in this case stated two causes of action; one upon a promissory note, the other for a balance alleged to be due on account. The latter was adjusted on the trial.

[1] Reported in 67 N. W. 999.

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As to the note, the complaint alleged that the defendants, at the time stated, made and delivered to the plaintiff their promissory note, and thereby promised to pay to the order of the plaintiff $500 in four months, with interest. The answer admitted the making and delivery of the note, but as to whether the plaintiff was, at the commencement of the action, the owner of the note, the defendants had no knowledge or information sufficient to form a belief. As a counterclaim the answer alleged that the parties hereto entered into a contract in writing, whereby the plaintiff agreed to sell and the defendants to buy 200 bicycles, at an agreed price for each, for the trade of the defendants during the then coming season; that the plaintiff refused to perform its part of the contract, whereby the defendants were damaged in the sum of $2,500. The making of the contract was denied by the reply. The trial court found for the plaintiff the amount claimed in the complaint, but did not make any finding as to the contract set up in the defendants' answer. The defendants then moved the court to make additional findings to the effect that the contract alleged in the answer was made, that there was a breach thereof, and that the defendants sustained damages as claimed; which were refused. The defendants appeal from the judgment.

There are 23 assignments of error, but they are properly classified by counsel as relating to the ownership of the note, the existence of the contract, and the defendants' damages for a breach thereof.

1. The plaintiff on the trial produced and offered the note in evidence, which appeared to have been indorsed in blank by the payee. The plaintiff also unnecessarily offered oral evidence tending to show that it was the owner of the note. The point is made that the plaintiff was not shown to have been the owner of the note, for the reason that the oral evidence was incompetent. It is of no consequence whether the oral evidence was competent or not, for there was no issue as to the ownership of the note under the pleadings; and, further, if there had been, the production of the note on the trial, indorsed in blank by the payee, was sufficient proof of plaintiff's ownership. The rule is that a bill or note payable to bearer or indorsed in blank by the payee may be transferred, like currency, by delivery, and possession is prima facie evidence of ownership. Randolph, Com. Paper, §§ 777, 1645.

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2. The defendants did not move the trial court to make additional findings as to the issues tendered by the counterclaim in their answer. Their motion was, as we have suggested, that the court find that the contract alleged in the answer was made by the parties hereto; therefore the denial of the motion was tantamount to a decision that the supposed contract was never made. Hence the question here is not whether there was evidence in the case which would have justified a finding that such a contract was made, but whether the evidence required such a finding as a matter of law. The evidence relied on by defendants to establish the contract consists of the correspondence between the parties, containing propositions, and qualified acceptances thereof. To establish a contract for the sale of property by the correspondence of the parties it must appear that there was a clear accession on both sides to one and the same set of terms. An offer to sell does not become a contract unless unconditionally accepted upon the exact terms of the offer. The acceptance must be unqualified without the suggestion of any new terms. Lanz v. McLaughlin, 14 Minn. 55, (72); Hamlin v. Wistar, 31 Minn. 418, 18 N. W. 145; Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690. Tested by this rule, it is reasonably clear that the correspondence fails to establish the contract alleged in the answer, for it appears that in one material particular at least the minds of the parties never met.

On December 13, 1894, the plaintiff, whose place of business was at Chicago, wrote the defendants at Minneapolis that if they would order 100 or 200 wheels, to be taken through the season of 1895, it would, for an order as above stated, make a net price for the wheels of $42.50 each; terms net, 60 days from the first of each month following the sale. December 17 defendants answered, and, without accepting the proposition, asked for exclusive sale of the wheel in Minnesota and North Dakota. December 20 plaintiff answered that it could not give right to exclusive sale. December 21 defendants replied, saying they would accept the proposition with the understanding that such wheels as they should want at any time before April 1 should be billed as of that date. December 22 plaintiff replied, saying: "We are pleased to have you accept our proposition on the Special wheel, and we wish you would kindly mail us an order for from 100 to 200 wheels," and, further, that the defendants' proposition as to billing wheels wanted prior to April 1 as of that date was not satisfactory,

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but the plaintiff offered to bill them as of March 1; that samples could be sent at once. December 29 the defendants answered, saying:

"Would be very much pleased to have you ship us immediately samples of your Special wheel. Send us two each of the lady's and gentleman's wheels, all with wood rims; two with Morgan & Wright, and two with Dunlop, tires (the gentleman's wheels to be with Dunlop tires). You did not answer our question in letter of recent date as to whether a lower quotation had been quoted on this Special wheel to the competitors we are to meet in this territory. We presume that such is not the case, but want an assurance from you to that effect. Also wish it understood that the fact that we are buying this Special wheel of you is to be kept confidential, and that our competitors are not to know from you that such is the case."

On January 5, 1895, the plaintiff answered, saying that order for sample wheels had been entered, and they would be shipped at once, and that they had quoted the lowest possible price on the wheels.

No further communications passed between the parties until January 11, when one of the defendants, Mr. Zimmer, was in Chicago, and met a Mr. State, an employé and stockholder of the plaintiff, whose duties were to attend to correspondence, make prices, appoint agents, and do work of that kind, who then informed him that the plaintiff could not furnish the wheels to the defendants, as it had made a contract with another party. Thereupon Zimmer replied that the defendants would insist on having the wheels in accordance with the agreement. The next day he saw Mr. Ames, the president of the plaintiff, and told him that the defendants must have the wheels in accordance with the contract, and requested that all wheels called for by the contract should be forwarded to the defendants. Ames replied they could not furnish the wheels, because they had made an agreement with another party.

Comment on this evidence is unnecessary. It falls short of establishing a contract, for the minds of the parties never met on the proposition whether sales prior to April 1 were to be billed on that date or March 1, or as to how many wheels the defendants would order. The defendants' counsel claims that Zimmer's request of Ames for the wheels according to the contract was an acceptance of the plaintiff's offer, and an order for the wheels before it was withdrawn, for the reason that State was not authorized to withdraw the offer. He appears to have been, in any event. The plaintiff is not questioning his

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authority. But it is immaterial whether he was or not, for the request to Ames to forward the wheels according to the contract, and that the defendants would insist on their contract, amounts to no more than a claim that the parties had already made a contract. It was not an acceptance of any of the propositions of the defendants. When the correspondence closed, there was no contract, and certainly none was made afterwards when the parties met in Chicago. The minds of the parties were very far from meeting on that occasion. The defendants claim that in any event they are entitled to damages for the nondelivery of the four sample wheels. If there was any obligation on the part of the plaintiff to deliver them, this is not the contract alleged in answer, which the trial court was asked to find upon.

Judgment affirmed.

W. I. ROGERS v. CHICAGO GREAT WESTERN RAILWAY COMPANY.[1]

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June 26, 1896.

Nos. 10,044—(210).

Master and Servant—Action for Injuries—Verdict Sustained.

Evidence considered, and *held*, that it sustains the verdict, and that the damages awarded by the jury are not so excessive as to justify the conclusion that they were the result of passion or prejudice on the part of the jury.

Appeal by defendant from an order of the district court for Ramsey county, Brill, J., denying a motion for a new trial. Affirmed.

Dan. W. Lawler, for appellant.

McDonald & Barnard and *C. D. & Thos. D. O'Brien*, for respondent.

START, C. J. Action for the recovery of damages on account of personal injuries sustained by the plaintiff, as he claims, on November 16, 1893, at Kenyon, in this state, by reason of the alleged negligence of the defendant in failing properly to repair one of its locomotives, upon which the plaintiff was then employed as an engineer.

[1] Reported in 67 N. W. 1003.

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The plaintiff had a verdict for $3,000, and from an order denying its motion for a new trial the defendant appealed.

The record presents but two questions for our decision: First. Was the verdict justified by the evidence? Second. Are the damages so excessive as to justify the conclusion that they were given under the influence of passion or prejudice?

1. The claim of the defendant is that the evidence conclusively shows that the plaintiff's injuries were not received at Kenyon, on November 16, but on the next day, at Randolph, and that the plaintiff, before the commencement of this action, released all claim for damages on account of such injuries. The trial court instructed the jury that the plaintiff could not recover for any injuries he sustained at Randolph; that the release related to injuries received at the latter place, and did not prevent the plaintiff from recovering for injuries received at Kenyon, if he was injured by the negligence of the defendant. The evidence, if believed by the jury, was ample to sustain a finding that the plaintiff was injured at Kenyon, as claimed.

It is further claimed by the defendant that the plaintiff knew of the defect in the locomotive, assumed the risk, and was guilty of contributory negligence in the premises. It is claimed by the plaintiff that at the time and place stated, and while his locomotive was at rest, he went out on top of it, to scrape the sand down into the sand box; and, in so doing, he necessarily stepped upon the railing on the left side of the locomotive, when it broke, by reason of its defective condition, causing him to fall, whereby he received an injury to his left knee. He gave evidence tending to establish this claim; also, that in October, prior to this accident, the locomotive was injured, the rail broken at a point where it passed through a groove, and one end loosened from the cab, and that the flues were leaking. He reported the locomotive for repairs. Repairs were made on it at the defendant's roundhouse, by parties, other than the plaintiff, charged with that duty. He further testified that, when the locomotive was again turned over to him, he was assured that the repairs had all been made; that they appeared to have been made; the end of the rail had been bolted to the cab; and he assumed that the repairs had all been made, and did not know that the break in the rail had not been repaired until after he was injured. The defendant gave evidence tending to show that the plaintiff did not report this

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specific defect in the rail; that his injuries were not occasioned by such defect, or at Kenyon; and, further, that he knew the condition of the rail when he took the locomotive, after it had been repaired; and that he assumed the risk of using it.

The trial court submitted the questions of the defendant's negligence and that of the plaintiff, and his assumption of the risk, in a clear and impartial charge, to which neither party excepted. The jury found for the plaintiff on these questions, and their verdict was approved by the trial court. We have given heedful consideration to the evidence, and our conclusion is that the verdict is sustained by the evidence.

2. The damages are not so large as to justify the conclusion that they were given under the influence of passion or prejudice. The undisputed evidence is that the plaintiff's injury resulted in chronic inflammation of the knee joint, and that the injury is permanent.

Order affirmed.

FRED DAVIS v. BOARD OF COUNTY COMMISSIONERS OF ST. LOUIS COUNTY.[1]

June 26, 1896.

Nos. 10,068—(264).

Constitution—Laws 1895, c. 249—Due Process of Law.

Chapter 249 of the Laws of 1895, providing for the location of section and quarter section corners by the county surveyor on the application of the resident owners of the section, is unconstitutional, for the reason that it deprives the landowners of their property without due process of law.

Appeal by plaintiff from an order of the district court for St. Louis county, Ensign and Morris, JJ., sustaining a demurrer to the complaint. Affirmed.

O. W. Baldwin, for appellant.

Phelps, Towne & Harris, for respondent.

START, C. J. This is an action by the plaintiff, who is county surveyor of the defendant county, to recover from the defendant the

[1] Reported in 67 N. W. 997.

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sum of $108 for establishing the section corners of a certain section of land in the county under the provisions of chapter 249, Laws 1895. The defendant demurred to the complaint, and the plaintiff appeals from an order sustaining the demurrer. The principal question for our decision is the constitutionality of the statute under which the services in question were rendered. The material provisions of the statute are these:

"Section 1. Whenever a majority of the resident land owners, in any government section in this state, wish the corners of the said section permanently marked, and the sub-divisional lines definitely located and the notes of the same duly recorded in the record books of the surveyor's office of the county; they shall, after giving at least ten (10) days' notice to each of the resident land owners of such intention, notify the county surveyor that they wish to have the section subdivided, the corners permanently marked and the notes of the same recorded.

"Sec. 2. The surveyor shall at his earliest convenience set a time when he will make such survey, and at the appointed time he, or one of his deputies shall appear and proceed to make such survey, according to the laws now made and provided for the subdivision of sections, provided that all the section corners of said section can be proven."

"Sec. 7. The cost of the survey shall be divided and paid in the following manner: The surveyor shall keep a careful account of the work done on the several parts of the section, and of the help furnished, and at the conclusion of the work apportion the costs in as equitable a manner as possible, for the relocation of a section corner to the four (4) sections adjacent and for the subdivision of the section to each subdivision, according to the costs and the benefits received.

"Sec. 8. The surveyor shall file with the county auditor a certificate of the costs of making such survey and the apportionment to each section and sub-divisional parts of the section, who shall assess the same against the property as other taxes, and a bill for the whole amount due the surveyor shall be audited and paid by the commissioners out of the general funds of the county."

It is manifest that the purpose of this statute is to enable a resident of any portion of a section of land to secure the location and marking of the section corners, and to compel all other owners of the four sections adjacent to contribute equitably to the expenses thereof, by apportioning the amount of them to, and assessing it upon the land of, each. This is the single purpose of the act, and if its provisions to secure such result are unconstitutional the whole statute fails; for, clearly, the legislature would not have provided for the

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advancement of such expenses from the county treasury if it had understood that the provisions for the apportionment of the expenses to the land benefited, and for indemnity to the county for such advancement, were void. O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513.

1. It is claimed by the plaintiff that the validity of the statute may be sustained on the ground that it is an exercise of the power of taxation. Clearly, the claim is untenable. The exhaustive brief of counsel for the plaintiff in support of his proposition seems to be based upon a misconception of the provisions of the statute.

The purpose of the statute is, as we have suggested, private; that is, to provide the legal machinery whereby the majority of the owners of a section of land may compel, at their pleasure, other owners in the same and adjacent sections to contribute to the expenses of locating the section corners. This is a purpose for which taxes cannot be levied. The act does not, as claimed by plaintiff, provide for taxing districts, and for a uniform tax based on a cash valuation of the land in each section. The expense of locating the corners is to be apportioned to the adjacent sections, not on the basis of their value, but on the basis of benefits received. This, if anything, is an attempted local assessment for a local improvement. That this is so, in its last analysis, no matter on what basis the county auditor divides and assigns the total burden resting on a section to the several subdivisions thereof, becomes apparent in cases where one man owns the whole of one of the adjacent sections which is assessed as one parcel. This statute does not provide for a local assessment. Only municipal corporations can be authorized to levy assessments for local improvements. State Const. art. 9, § 1; State v. District Court of Hennepin Co., 33 Minn. 235, 22 N. W. 625. But, as was incisively said by the learned trial judges:

"In the act in question the power to levy the tax or assessment is not delegated to any municipal corporation. Neither county, city, nor town has any duty or power in determining the necessity of the tax, or that it is for a public purpose. The legislature does not determine that a public purpose or necessity demands such tax. * * * The power to tax a man's land rests upon the mere wish of two or more resident landowners, who need not even be citizens of the state. No necessity need exist for the action. None need be pretended."

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2. The main reliance of the plaintiff in support of his claim that this act is constitutional is that it is within the police power of the state, and a proper exercise thereof by the legislature. We are of the opinion that laws regulating the locating of the boundaries, and fixing permanent monuments to mark them, between landowners, and providing for some public officer or special tribunal to ascertain the cost of the work, and apportion the amount thereof to the respective owners benefited thereby, and for collecting the same, are in the nature of police regulations. And if the procedure provided for determining the liability of such landowners, and enforcing the same, constitutes due process of law, such laws are unquestionably a valid exercise of legislative power. Coster v. Tide Water Co., 18 N. J. Eq. 54. Such laws, in principle, are similar to laws regulating partition fences, the constitutionality of which cannot be questioned, where provision is made for notice to the landowners, and opportunity to be heard. Such notice is essential to the validity of the proceedings. McClay v. Clark, 42 Minn. 363, 44 N. W. 255; Myers v. Dodd, 9 Ind. 290, 68 Am. Dec. 624, note, 626–633; 7 Am. & Eng. Enc. Law, 896. But the vice in the statute in question is that the procedure for locating the boundary lines, marking them by monuments, apportioning the cost to the property benefited, and enforcing payment thereof, is not "due process of law."

The proceedings authorized by the statute are not simply administrative, like tax proceedings to secure a proper revenue for the support of the government, but they are judicial in their nature; hence decisions of this and other courts as to what constitutes "due process of law" in tax proceedings are not in point. It is not practicable to define the term "due process of law." The general principles for determining in particular cases whether the procedure provided by the statute is or is not due process of law are stated in the case of Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315. See same case, and notes, 20 Am. St. Rep. 547, 554. It is only necessary here to repeat that in proceedings of a judicial nature, affecting the property rights of the citizen, due process of law requires notice to him, and an opportunity to be heard; and a statute affecting such rights, which is not enforceable in the usual modes established with respect to kindred matters according to the course of the common law, is open to the charge of depriving a party of his property without due process of law.

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The statute in question does not provide for notice, actual or constructive, to any of the landowners, of the time when the work is to be done, and the cost apportioned to the several parcels of land benefited. It does provide that the parties shall, after giving at least ten days' notice to resident landowners of an intention to have the section corners located and marked, notify the county surveyor of their wish in the premises, who thereafter sets a time for the making of the survey. Notice of this time is not required to be given to any one. So far as nonresident landowners are concerned, there is no provision for notice to them of any kind. Again, the mode of enforcing the obligation of a landowner to contribute his share of the cost of the work is not the usual one established with respect to kindred matters according to the course of the common law. Under the provisions of this statute, the obligation of the landowner, whether a resident or nonresident, to contribute to the expense of the work, may be established, apportioned, and enforced by an arbitrary sale of his land, without any notice or hearing whatever.

As already suggested, the statute is not the exercise of the taxing power of the state, and the usual methods of enforcing taxes are not the established modes of enforcing the obligation of the several landowners to contribute to the cost of the work in proportion to benefits received, according to the course of the common law. The statute undertakes to relieve private parties from the burden of enforcing the obligations by ordinary judicial procedure, by requiring the auditor to enforce it by the legal machinery for the collection of taxes, and the county commissioners to anticipate the collection by advancing the cost of the work out of the general funds of the county.

A comparison of the provisions of this statute with those of the kindred statute relating to line fences will set the arbitrary provisions of the former in a clearer light. In the case of partition fences, one party cannot arbitrarily determine for himself the necessity of repairing or rebuilding the fence, but after notice to each party the supervisors determine the question, and if they direct it to be done they fix the time for performance, and if the party neglects to build or repair his part of the fence within the time limited the opposite party may do so. The supervisors then judge as to its sufficiency, ascertain the value thereof, and give a certificate therefor, including their fees. Provision is made for enforcing payment of double the

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amount of the certificate by civil actions. G. S. 1894, §§ 2057, 2058. If we eliminate from this partition fence statute all provisions for notice to the parties, and for hearing and deciding the question of the necessity for the work by a disinterested tribunal, and add to it a provision that the party building the fence may present his certificate to the county auditor, who must assess the amount thereof as a tax on the land of the opposite party, and that the county commissioners must pay the amount of the certificate to the holder thereof, we should have substantially the arbitrary provisions of the statute in question.

We hold the statute to be unconstitutional, for the reason that it deprives the landowners of their property without due process of law.

3. The plaintiff further claims that he is entitled to his pay for his work from the county, even if the statute is void. Our opinion is otherwise. The work was not done for the county, or pursuant to any contract, express or implied, with it. The case of Raymond v. County Commrs. Stearns, 18 Minn. 40 (60), relied on by the plaintiff, is not in point; for in that case the legislature, by a valid statute, authorized and directed the plaintiff to locate and survey a state road through the county at the expense of the county. There is no element of estoppel in the case at bar, as against the county.

Order sustaining demurrer affirmed.

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LAURA V. TRUESDALE v. HENRY G. SIDLE and Others.[1]

June 26, 1896.

Nos. 10,118—(810).

Mistake of Law—Equitable Relief.

It is only in special cases that equity will relieve a party from the consequences of a pure mistake of law. It will not do so when the opposite party is blameless in the premises, and the parties cannot be replaced in their former positions.

Foreclosure—Action by Mortgagor for Surplus—Equitable Defense.

The defendants foreclosed by advertisement two mortgages on certain lots of the plaintiff, and were the purchasers at the sale, and included in

[1] Reported in 67 N. W. 1004.

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their bid attorney's fees, which they believed to be authorized by the terms of the mortgages, but which clearly were not. No redemption was made, and the plaintiff brought this action to recover the amount of such attorney's fees, as a part of the surplus. The lots depreciated in value one-half between the time of the sale and the beginning of the action. *Held*, that the defendants were not entitled to have the foreclosure sale set aside and a resale ordered, or to defeat the action by tendering a deed of the lots upon being paid the amount due on the mortgages.

Action in the district court for Hennepin county against Henry G. Sidle, and Charles K. Sidle and others, as executors of the last will and testament of Jacob K. Sidle. The mortgages referred to in the opinion were foreclosed and bid in by said Henry G. Sidle and said executors. The notice of foreclosure sale in each case stated that the premises would be sold to pay the mortgage debt, interest thereon, and $25 attorney's fees upon each lot and costs and disbursements. By the terms of the mortgages the mortgagees had the right to pay taxes and include the amount paid as part of the debt upon foreclosure. After the foreclosure sale defendants paid certain taxes for 1889, 1890 and 1891. From an order, Russell, J., denying a motion for a new trial, defendants appealed. Affirmed.

James W. Lawrence, for appellants.

Smith, Pulliam & Smith, for respondent.

START, C. J. The plaintiff on April 4, 1892, was the owner of certain lots in Sidle Park addition to Minneapolis, which were subject to two mortgages to Henry G. Sidle and Jacob K. Sidle. These mortgages, in their terms as to attorney's fees, are similar to those construed by this court in the case of Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730. In fact, they are a part of the same mortgages referred to in that case. The defendants, on the day named, as owners of the mortgages here in question, bid in the lots on a foreclosure sale thereof by advertisement for the full amount secured by the mortgages. In such proceedings they also included in their bid $25 as attorney's fees upon each and every lot sold under the same notice, also printer's fees at the legal rate, when in fact they paid only one-half of that amount. The defendants paid no part of their bid to the sheriff, except his fees. No redemption was made from such foreclosure, and this action was brought to recover the surplus remaining in the hands of the defendants after satisfying the amount

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secured by the mortgages on the plaintiff's lots, and all legal attorney's fees and costs. The trial court found such surplus to be $161.66, and ordered judgment for the plaintiff for that amount, with interest. The defendants appeal from an order denying their motion for a new trial.

The defendants concede that they were not entitled to $25 attorney's fees on each lot sold, and that, unless they "are entitled to the equitable relief asked in the answer, plaintiff is entitled to the judgment ordered by the court below." The relief claimed was that the foreclosure sale be set aside, and a new sale directed, or that the defendants be permitted to deed the lots to the plaintiff upon being paid, within a reasonable time, the actual amount due on the mortgages. It is claimed, as a basis for this relief, that the attorneys foreclosing the mortgages were honestly and excusably mistaken in believing that the charges made for attorney's fees were legal, and that otherwise the amount thereof would not have been included in the purchase price bid at the foreclosure sale. In other words, the claim is, not that any mistake was made as to the amount of the bid, but as to the legal effect of the mortgage. If the defendants had understood at the time that they could not retain from the proceeds of the sale the excessive attorney's fees, they would not have included the amount in the bid. The mistake, then, was one of law, or, as in effect found by the trial court, the defendants, at the time of the sale, knew all of the facts connected with the mortgages and the foreclosure, and made no mistake with reference thereto. In estimating the amount of the attorney's fees due under the mortgages, they placed an unauthorized construction on the statute and the terms of the mortgages. There was no mistake of fact, but one of law only.

It is settled in this state that in special cases the court will relieve a party from the consequences of his mistakes of law. If nothing more than a bare mistake of law be shown, the relief will rarely, if ever, be granted. But where it further appears that a party is availing himself of the mistake to enforce an unconscionable advantage, without consideration, and the opposite party is without blame in the premises, and the parties can be replaced, respectively, in their former positions, equity will interfere to relieve from such mistake of law. Benson v. Markoe, 37 Minn. 30, 33 N. W. 38; Lane

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v. Holmes, 55 Minn. 379, 57 N. W. 132. Now, assuming that the defendants made their bids at the mortgage sales in the honest belief that the amounts bid were due and legally chargeable against the lots—a fact which the court declined to find,—still the defendants' case does not come within the rule entitling a party to relief from mistakes of law.

In addition to the facts already referred to, the trial court found that the plaintiff's lots, at the time of the sale, were of no greater value than $125 each, and the average amount due on them, by the terms of the mortgage, was $140 on each lot; that since the sale the value of the lots has decreased, and at the time of the commencement of this action, and ever since, their value has not exceeded $60 each. The defendants could not, by deeding the lots to the plaintiff, as they offered to do on the trial, on being paid the amount due on the mortgages, place the plaintiff in her former position before the foreclosure; for the lots they proposed to return to her were worth less than 50 per cent. what they were worth three years and some months before, when they purchased them at the sale. Not only this, but her debt, which was satisfied by the sale, would be revived, and increased by more than three years' interest, by canceling the foreclosure proceedings. In the meantime the defendants have held the lots, and if they had increased in value 50 per cent. the defendants would have had the benefit of the gain. It would be inequitable to permit them now to rescind the sale; especially so as the plaintiff never did anything to induce them to include the excessive attorney's fees in their bid; also, in view of the fact that the attorney's fees charged were so excessive and manifestly illegal as to suggest that, if the defendants' attorneys were honestly of the opinion that they were legal, their judgments were warped by their interests. See Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730, as to the amount and character of such attorney's fees.

The trial court did not err in denying the defendants the relief claimed in their answer.

The defendants also claim that they are not jointly liable for the surplus, and that the estate of Jacob K. Sidle is not bound. These questions are settled by Eliason v. Sidle, supra.

The further claim is made that the surplus belongs to the second mortgagee. No such claim is made by the answer, and the second

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mortgagee has made no claim to the surplus. If the defendants had been of the opinion that the plaintiff was not the real or only party in interest, they could have had the second mortgagee made a party.

The defendants did not have the right to offset, against the surplus, taxes paid by them on the lots after the foreclosure of the mortgage. The notice of the sale, and the circumstances of the payment of the taxes, in this case, differ radically from those in the case of Gorham v. National Life Ins. Co., 62 Minn. 327, 64 N. W. 906.

Order affirmed.

AGNES M. DE FOE v. ST. PAUL CITY RAILWAY COMPANY.[1]

June 29, 1896.

Nos. 9900—(174).

Carrier—Injury to Passenger—Alighting from Moving Car.

In an action to recover damages alleged to have been the result of a fall caused by defendant's negligence, while plaintiff was alighting from one of its cars, it is *held*, in view of the condition of the evidence, that the trial court erred when it refused to charge the jury that, if the plaintiff fell by reason of getting off the car while it was slowing down for the purpose of stopping, she could not recover.

Appeal by defendant from a judgment of the district court for Ramsey county in favor of plaintiff for $375.45, after a trial before Egan, J., and a jury. Reversed.

Munn, Boyesen & Thygeson, for appellant.

C. D. & Thos. D. O'Brien, for respondent.

COLLINS, J. This was a personal injury case, in which plaintiff had a verdict. She was a passenger upon one of the cars on defendant's cable line in the city of St. Paul. According to the evidence offered in her behalf, the car came to a full halt at its regular stopping place at the intersection of Wabasha with Fourth street, and almost immediately, while plaintiff was in the act of alighting, it was started with a sharp jerk, throwing her to the pavement, and causing the injuries complained of. The witnesses for the defense all testi-

[1] Reported in 68 N. W. 35.

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fied that as the car slackened speed, for the purpose of stopping, and before it had stopped at all, plaintiff attempted to step to the ground, and, in so doing, fell. The issue of fact thus presented to the jury was clear-cut, and could not have been misunderstood. The only negligence attributed to defendant in the complaint or upon the trial was in suddenly jerking the car after it had come to a full stop, and while plaintiff was stepping to the ground. It was not claimed that defendant was negligent in any other manner, nor was any other negligent act shown upon which to base a verdict for plaintiff. If, therefore, the accident happened as was testified to by defendant's witnesses, by plaintiff's stepping from the car before it halted, a verdict for plaintiff could not be sustained.

This being the condition of the evidence, defendant's counsel requested the court to charge the jury that, if the plaintiff fell by reason of getting off the car while it was slowing down, she could not recover. This was refused, nor was the substance of the request given elsewhere in the charge. In fact, from the general way in which the jurors were instructed, they were fully warranted in returning a verdict for plaintiff, although satisfied that the accident occurred precisely as stated by defendant's witnesses. In view of an entire absence of evidence tending to show that defendant was negligent in any manner unless plaintiff's version of the occurrence was correct, the trial court erred when it refused to charge as requested.

It is, perhaps, advisable to note that there was no invitation, express or implied, on the part of the trainmen, for plaintiff to get off the car until it stopped; and, further, as before stated, that there was no evidence which would have justified a finding that the defendant was negligent while the car was slowing down for the purpose of stopping.

Judgment reversed.

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R. JAMES MORRISON and Another v. CHARLES T. ARONS and Others.[1]

June 29, 1896.

Nos. 9023—(173).

Contract of Employment—Construction—Compensation of Employé.

That part of a contract under which one of the defendants entered into the employ of plaintiffs as a general manager, salesman, and collector, whereby the time and manner of ascertaining and determining the amount of the employé's compensation,—a share of the profits of the business,—construed. *Held* that, although there was to be an ascertainment each month, this was only provisional, and subject to revision and accurate determination when the relations between the employers and employé were finally determined.

Bond for Faithful Performance—Variation from Contract—Release of Sureties.

In an action on a bond given by the employé, with sureties, to his employers, conditioned for the faithful performance of his duties, and particularly for a repayment of all moneys withdrawn by him in excess of his share of the profits, it is *held* that the contract of suretyship was altered by a variation or departure from the essential terms of the employment agreement, and that the sureties were thereby released from their obligation.

Action in the district court for Ramsey county. The case was tried before Kelly, J., who ordered judgment against defendant Arons for $801.43, and against defendants Williams and Hall for $559.50, with interest. From an order denying a motion for a new trial defendants Williams and Hall appealed. Reversed.

Fred N. Dickson, for appellants.

Frank A. Hutson and *Warner, Richardson & Lawrence*, for respondents.

COLLINS, J. Plaintiffs entered into business as co-partners, and employed defendant Arons as general manager, salesman, and collector. According to the written contract, the employment was to continue as long as mutually agreeable. Arons was to receive as compensation for his services a sum equal to one-half the net profits of the business, and these profits were to be ascertained as follows:

"During the existence of the employment of said party of the second part, once each month, commencing with December 1, 1892, a

[1] Reported in 68 N. W. 33.

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just and true inventory of the assets and liabilities of said firm shall be taken, and all accounts which are considered bad shall be charged to profit and loss, and from the residue of the accounts due said firm shall be deducted five per cent. of the aggregate amount thereof as a reserve to cover bad debts, and the excess of the assets over the liabilities and the capital stock of said firm shall be determined and agreed upon as the net profits of said business, and a sum equal to one-half of such excess shall then and there be credited to said party of the second part as and for his compensation, and be considered an expense of said business. That when the relation between said firm and said party of the second part is extinguished, then the actual amount of profit or loss, as the case may be, of the business of said firm, shall be determined, and, if there has been a net profit, a sum equal to one-half thereof shall be allowed said party of the second part, and any errors in estimating the net profits at the previous stated periods shall then and there be rectified, and, if said party of the second part shall have withdrawn more money from said firm than he is entitled to, he shall then and there forthwith repay the same; and, if there is any amount due him on account of his compensation, it shall then and there forthwith be paid him."

Arons, as principal, and defendants Williams and Hall, as sureties, entered into a bond, in which plaintiffs were obligees, which, after reciting that Arons was about to enter plaintiffs' employ as general manager, salesman, and collector, provided, and was conditioned, that:

"If the said Charles T. Arons shall faithfully and honestly perform all of the duties of his said employment, and shall keep just and true accounts of all moneys received and expended and all property bought and sold for or on account of said firm by him or under his direction, and shall faithfully and fully, and as often as required, account for and pay over to said firm any and all moneys belonging thereto collected or received by him, or which in any manner come into his hands in the course of his employment by said firm; and shall forthwith and on demand repay to said firm any and all moneys he shall have withdrawn therefrom for his own use in excess of the compensation due him for his services under the terms of his agreement with said firm in that behalf (whether such moneys shall have been so withdrawn with the consent of said firm or otherwise), as often as it shall be determined that such overdraft has been made, then the above obligation to be void; otherwise to remain in full force and virtue."

This action was brought to recover an amount of money said to be due on the bond, and the trial was by the court. No evidence was introduced tending to show any other settlement or accounting than

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that had when Arons' term of employment ended. In fact plaintiffs admitted that they never ascertained, and could not, at the time of the trial, ascertain, what the respective monthly profits of the business had been. At the conclusion of the plaintiffs' case and again at the conclusion of the entire case, the defendant sureties moved the court to dismiss the same as to them upon the ground that, as it affirmatively appeared from the evidence and admissions that no monthly settlements or accounting had been had as provided for in the contract of employment, the sureties upon the bond had been released from liability. These motions were denied, and the court made its findings of fact and conclusions of law ordering judgment in plaintiffs' favor.

The court found the allegation in the complaint that no settlement or accounting was had between the parties until after Arons' employment ceased, to be true. We agree with the court below in its construction of the contract, but we cannot concur in its holding that the sureties were not discharged by the failure and omission to have monthly accountings and settlements between Arons and plaintiffs. The former was to have advanced to him $100 each month for personal expenses and on account of his compensation under an agreement that, if this amount, with other sums of money which came into his possession, exceeded one-half of the net profits of the business, the excess should be promptly refunded. What the profits were, and the sum due to plaintiffs, if anything, were to be provisionally ascertained each month; and, had this been done, it is quite certain that plaintiffs would have discovered before the expiration of 13 months that the business was not profitable, while Arons would have learned that he was far from earning a living out of it. The natural result would have been for both parties to terminate their contract relation, and avoid further loss. It is evident that there would be much less hesitation on the part of a person called upon to become a surety upon a bond given for the faithful performance of a contract with such conditions than if the real situation was not to be ascertained for months. The condition in the employment contract whereby monthly accountings and settlements were agreed upon was an exceedingly beneficial one for all concerned. It was an essential feature of the contract whereby Arons agreed to conduct plaintiffs' business enterprise for an indefinite period of time, his compen-

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sation to be determined by the net profits. The contract of suretyship was departed from and varied when this provision was wholly disregarded, and the case is brought directly within the rule that, if an essential condition of such a contract is not complied with, a surety is not bound. A new trial must be had.

Order reversed.

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GEORGE N. HOLLAND v. DULUTH IRON MINING & DEVELOPMENT COMPANY and Others.[1]

June 29, 1896.

Nos. 9942—(153).

Action to Enforce Stockholders' Constitutional Liability — Conclusiveness of Judgment against Corporation.

The stockholders of a corporation, in an action against them to enforce their personal liability arising under the constitutional provisions or by statute, are, upon the question of corporate indebtedness, concluded by a judgment previously obtained against the corporation.

Same—Judgment by Default.

Such a judgment, although entered by default, is also an adjudication that under the allegations of the complaint there was due to the judgment creditor the amount for which judgment was entered.

Who are Stockholders—Stock Book as Evidence.

When the name of an individual appears on the stock book of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting the presumption, is cast upon him.

Same—Stock Book—How Kept.

The entries in the stock book of defendant corporation were therefore admissible in evidence for the purpose of raising the presumption before mentioned. Nor was it necessary that such book should have been kept in any particular manner, or that it contain the entries prescribed by statute.

Same—Finding Sustained.

Held, in view of the entries contained in the stock book, supplemented by the identifying testimony of the witnesses, taken in connection with the fact that defendant Henry S. Wilson offered no testimony tending to deny his member-

[1] Reported in 68 N. W. 50.

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ship in the corporation, that the finding that he was a stockholder was supported by the evidence.

Same—Necessity of Certificate.

In order to constitute one a stockholder in a corporation, it is not necessary that the certificate to which he is entitled be issued.

Same—Finding Sustained.

Held, upon the evidence in this case, that the trial court was justified in finding defendants Chapman and Sheridan to have been stockholders in the corporation, although certificates had never been issued, nor was it shown that any formal action had been taken whereby they became stockholders.

Action in the district court for St. Louis county by a judgment creditor against defendant corporation and its stockholders for the appointment of a receiver, the sequestration of its property, and the enforcement of the liability of its stockholders. It appeared that plaintiff's judgment had been entered against the corporation by default. The case was tried before Moer, J., who found in favor of plaintiff and ordered judgment against the stockholders. From an order denying a motion for a new trial, defendants Wilson, Chapman, Sheridan and other stockholders appealed. Affirmed.

Handlan & McGregor, for appellant Wilson.

The stockholder's liability for unpaid subscriptions is an asset of the corporation and enforceable by it, while his constitutional or statutory liability is directly to the creditors and not enforceable by or an asset of the corporation. In re People's L. S. Ins. Co., 56 Minn. 180, 57 N. W. 468. But see Frost v. St. Paul B. & Inv. Co., 57 Minn. 325, 59 N. W. 308. In an action to enforce the individual liability of stockholders, which is created by the constitution and distinct from their obligation as corporators to the corporation or creditors, the admission of the judgment against the corporation is not admissible as evidence. The liability of the stockholders in such cases is not for the judgment, but for the original debt, which rests upon them as individuals and not as corporators, and a complaint against them founded upon the judgment is bad on demurrer. Trippe v. Huncheon, 82 Ind. 307; Southmayd v. Russ, 3 Conn. 52; Mokelumne H. C. & M. Co. v. Woodbury, 14 Cal. 265. The judgment, if admissible at all, was only prima facie evidence.

The stock book of the corporation was inadmissible to prove that defendant was a stockholder. Being a stranger to the corporation, he

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was not chargeable with admissions in its records until he had previously been connected with the corporation by evidence aliunde. Redding v. Godwin, 44 Minn. 355, 46 N. W. 563; 1 Wharton, Ev. § 662; 1 Phillips, Ev. 449; 1 Greenleaf, Ev. § 493; Haynes v. Brown, 36 N. H. 568. The entries in the stock book of a corporation are solely for the benefit and protection of the corporation (Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261) and of its creditors (Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721; Mudgett v. Horrell, 33 Cal. 29; 3 Thompson, Corp. §§ 3657–3659; Howard v. Glenn, 85 Ga. 238, 11 S. E. 610; Tripp v. Appleman, 35 Fed. 19; Glenn v. Liggett, 47 Fed. 480). The stock book did not conform to G. S. 1894, § 2599, and hence was not admissible. Tripp v. Appleman, supra; Glenn v. Liggett, supra; Taussig v. Glenn, 2 C. C. A. 318, 51 Fed. 413; Morawetz, Corp. § 76. To create the presumption that an individual whose name appears as a stockholder is prima facie the owner of the stock, it must be shown by the contents of the stock book, or by extrinsic evidence, or by both combined, that the name found in the book was so entered therein as the name of the party to the litigation. Liggett v. Glenn, 2 C. C. A. 298, 51 Fed. 393; Glenn v. Liggett, supra; Taussig v. Glenn, supra. The stock book did not sustain a finding that defendant was the owner of stock and that a certificate had been issued to and received by him. Turnbull v. Payson, 95 U. S. 425; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; Lehman v. Glenn, 87 Ala. 618, 6 South. 44; Taussig v. Glenn, supra; Liggett v. Glenn, supra; Weber v. Fickey, 52 Md. 500; Tripp v. Appleman, supra.

C. d'Autremont, Jr., and *Cash, Williams & Chester*, for appellant Sheridan, and *Mann & Corcoran*, for appellant Chapman.

A mere contract to become a stockholder is insufficient to charge a party as stockholder until the contract is executed by the delivery of the stock. Burt v. Rattle, 31 Oh. St. 116; Medler v. Albuquerque Co., 6 N. M. 331, 28 Pac. 551; Morawetz, Corp. § 46; Thrasher v. Pike Co. R. R. Co., 25 Ill. 393; Stowe v. Flagg, 72 Ill. 397–402; Rhey v. Ebensburg & S. P. R. Co., 27 Pa. St. 261; Mt. Sterling C. Co. v. Little, 14 Bush (Ky.) 429; Lake Ontario S. R. R. Co. v. Curtiss, 80 N. Y. 219–223; Quick v. Lemon, 105 Ill. 578; Clark v. Continental Imp. Co., 57 Ind. 138; Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295–301; Wheeler v.

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Thayer, 121 Ind. 64, 68, 22 N. E. 972; Wolverhampton N. W. Co. v. Hawkesford, 95 Eng. C. L. 336; Tracy v. Yates, 18 Barb. 152.

The judgment recovered in the former action against the defendant company is not conclusive against the stockholders. In those jurisdictions where a judgment against the corporation is held conclusive against the stockholder, regarding his statutory or constitutional liability, it is urged that it would be a hardship to require the creditor to prove his case twice. This reasoning does not apply in this state under the statutory remedies given to the creditor, under either of which the defendant stockholders would have had a hearing, viz.: (1) At law under G. S. 1894, §§ 2600–2602; Merchants Nat. Bank v. Bailey Mnfg. Co., 34 Minn. 323, 25 N. W. 639; (2) in equity, under G. S. 1894, § 5905; First Nat. Bank v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997.

Jaques & Hudson, for appellants Brown.

The judgment against the corporation in favor of plaintiff is not conclusive evidence of the liability of the corporation to him in the present action. Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155; Stephens v. Fox, 83 N. Y. 313; Trippe v. Huncheon, 82 Ind. 307; Union Bank v. Wando M. & M. Co., 17 So. Car. 339; Southmayd v. Russ, 3 Conn. 52; Chestnut v. Pennell, 92 Ill. 55; Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554; Hawkins v. Glenn, 131 U. S. 330, 9 Sup. Ct. 739; Beauchaine v. McKinnon, 55 Minn. 318, 56 N. W. 1065. The complaint shows that the corporation was not indebted to plaintiff in the action at the time the judgment was entered. A judgment entered by default on a complaint that does not state a cause of action is void. 1 Black, Judgm. § 84.

Billson, Congdon & Dickinson, for respondent.

The stockholders are concluded by the judgment previously obtained against the corporation. Frost v. St. Paul B. & I. Co., 57 Minn. 325, 331, 59 N. W. 308; Thompson, Corp. § 3392; 2 Black, Judgm. § 583; Bissit v. Kentucky R. Nav. Co., 15 Fed. 360, note; Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 858, note; 2 Morawetz, Corp. § 619.

The entries in the stock certificate book were admissible against defendant Wilson, and in connection with the parol testimony, were

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sufficient to establish prima facie that he was a stockholder. Turnbull v. Payson, 95 U. S. 421; Finn v. Brown, 142 U. S. 67, 12 Sup. Ct. 136; Liggett v. Glenn, 2 C. C. A. 298, 51 Fed. 393; Rockville & W. T. Road v. Van Ness, 2 Cranch, C. C. 451, Fed. Cas. No. 11,986; Hoagland v. Bell, 36 Barb. 57; Chapman v. Porter, 69 N. Y. 276; Wood v. Coosa & C. R. R. Co., 32 Ga. 273; Semple v. Glenn, 91 Ala. 245, 6 South. 46, 9 South. 265; Glenn v. Orr, 96 No. Car. 413, 2 S. E. 538; Sayre v. Glenn, 87 Ala. 631, 6 South. 44; Pittsburg W. & K. R. R. Co. v. Applegate, 21 W. Va. 172; Weber v. Fickey, 47 Md. 196; 52 Md. 500; 1 Cook, Stock. & Stockh. § 55; 1 Morawetz, Corp. § 270. In order to constitute one a stockholder the certificates to which he was entitled need not have been actually issued. Columbia E. Co. v. Dixon, 46 Minn. 463, 466, 49 N. W. 244; Marson v. Diether, 49 Minn. 423, 427, 52 N. W. 38; 1 Cook, Stock. & Stockh. § 192. Stockholders cannot evade their liability by failing to keep books as required by the statute. This would be to take advantage of their own wrong. The incorporators must be regarded as stockholders even if no formal action was taken by the corporation authorizing the issuance of stock to them in exchange for the leases. Where a corporation or a board of directors consists of a small number of persons, they may transact business without formal votes or resolutions. Melledge v. Boston Iron Co., 59 Mass. 158, 179; 2 Cook, Stock. & Stockh. § 714. Although no record or minute is made of such informal acts or understandings, they may be established by parol proof. Allis v. Jones, 45 Fed. 148; 1 Beach, Pub. Corp. § 181; Morrill v. Segar Mnfg. Co., 32 Hun, 543. Even in the absence of direct testimony, corporate action may be shown by facts and circumstances from which it may be reasonably inferred. Moss v. Averell, 10 N. Y. 449, 454; Bank of U. S. v. Dandridge, 12 Wheat. 70. It would not be unreasonable to infer that, at some of the directors' meetings, informal conferences, agreements and understandings were had as to the issuance of this stock, which all understood to belong to them individually, and the certificates to which remained unissued for purposes of their individual convenience. No formal action was necessary. Walworth Co. Bank v. Farmers L. & T. Co., 16 Wis. 629; Sherman v. Fitch, 98 Mass. 59; Sherman C. T. Co. v. Swigart, 43 Kan. 292, 23 Pac. 569; Greig v. Riordan, 99 Cal. 316, 33 Pac. 916. See Pittsburg, C. & St. L. Ry.

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Co. v. Keokuk & H. B. Co., 131 U. S. 381, 9 Sup. Ct. 770; Fort Worth Pub. Co. v. Hitson, 80 Tex. 216, 14 S. W. 843.

The corporation was not organized exclusively for manufacturing or mechanical purposes within the meaning of the constitution. First Nat. Bank v. Winona Plow Co., 58 Minn. 167, 59 N. W. 997; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681; Arthur v. Willius, 44 Minn. 409, 46 N. W. 851; Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074.

COLLINS, J. This was an action brought by a judgment creditor of a corporation to enforce against the stockholders individually their double liability for the corporate debts.

At the trial the court held that the judgment previously obtained against the corporation was conclusive evidence of its indebtedness and liability, and would not permit the stockholders to litigate the merits of the claim upon which it was based. The correctness of this position is directly attacked upon an appeal from an order denying defendant stockholders' motion for a new trial.

The practical effect of the decision in Dodge v. Minnesota Roofing Co., 16 Minn. 327 (368), was to hold that a judgment against a corporation was conclusive against the stockholders in any action or proceeding to enforce their individual liability, although the exact question was not before the court. And in the case of Frost v. St. Paul B. & I. Co., 57 Minn. 325, 59 N. W. 308, which was an action upon judgments against a corporation for the recovery of money to enforce the liability of stockholders for unpaid subscriptions, and their statutory liability, it was held that the judgments were evidence of the indebtedness of the corporation; the court saying that a judgment for the recovery of money is, as against everybody, evidence of a debt from and after its rendition, as fully as could be any other transaction between the parties.

The force of these decisions seems to be admitted by counsel for the defendants here, but they insist that there is a distinction in principle, as to the effect or conclusiveness of judgments against corporations, between the cases in which actions are brought against stockholders on account of unpaid subscriptions and those wherein the object is to enforce the statutory or constitutional liability, the ground for distinguishing being that anything due for unpaid sub-

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scriptions is an indebtedness to and an asset of the corporation, while the statutory or constitutional liability is not. Because this liability is to the creditors only, and is not a corporative asset, nor can the corporation enforce it, counsel urge that when the action is based upon it there is no privity of interest between the corporation and its stockholders by reason of which the latter are concluded by a judgment against the former, or which can even make the judgment prima facie evidence of a corporate indebtedness. It seems to be conceded by counsel that, to the full extent of the corporate property, and whenever its assets are to be reached, there is this privity of interest, and the stockholders are bound by the judgment. Reduced to a simple proposition, the position of counsel is that when the purpose of the action is to enforce a direct liability to the corporation the stockholders cannot question the judgment, but if the liability is indirect, arises only when the corporation assets are insufficient to satisfy the debts, and can only be enforced by the creditors, the judgment is ineffectual for any purpose.

When we consider the character of stock corporations, and the powers and duties of the officers selected and authorized to manage them, it is not an easy task to demonstrate upon principle why a judgment against the body corporate should sometimes and under some circumstances bind the stockholders, and not at all times and under all circumstances; or why stockholders are privies in interest, and therefore concluded by the judgment, when their liability to respond to the full extent of amounts due on unpaid subscriptions is involved, and not privies in interest, and not bound by the judgment, when the same creditor undertakes to compel response to statutory or constitutional liability to pay the same judgment. Both liabilities are incurred at the same time, and by the same act, namely, by the act of subscribing for stock. The subscriber then becomes obligated to pay for his shares, and also to pay an amount equal to their face value, if necessary, and his liability is as definitely fixed in the one case as in the other. The difficulty we have referred to is apparent from an examination of the cases cited by counsel in their briefs, in which the courts have attempted to give reasons for restricting the effect of judgments against corporations, and limiting their binding force to cases in which corporate assets only were involved; and of those cited by counsel Miller v. White, 50 N. Y. 137, and Stephens

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v. Fox, 83 N. Y. 313, lead. But there is great uncertainty as to the exact position of the courts of New York on this question, as has been well shown by Mr. J. C. Harper in his note to Bissit v. Kentucky River Nav. Co., 15 Fed. 353. To the cases commented upon by him as tending to the existing confusion in that state we will add Allen v. Clark, 108 N. Y. 269, 15 N. E. 387, in which Miller v. White, supra, is alluded to.

Certainly the rule in New York is not settled, and, in our judgment, the logic of the reasoning adopted in some of their cases, in support of a conclusion that to the extent of the corporate property or assets the shareholders are bound by the judgment, tends thoroughly to establish the doctrine which seems to prevail in this country that, as the statutory or constitutional liability is an obligation voluntarily assumed by the stockholder when he subscribes for his shares, the officers of the corporation represent him as to that liability to the same extent as they do when his ordinary liability assumed by the same act of subscription is involved. The officers of the corporation, in the absence of fraud and collusion, can bind the stockholders, and fasten upon them obligations which cannot be questioned by the latter. The officers can not only make the corporation liable to the full extent of the corporate assets, but they can also fasten the statutory or constitutional liability upon the stockholders. This liability is incident to taking stock, and is incurred by the subscriber. When subscribing for his shares and entering into the organization, he undertakes the responsibility for the result of litigation in which the corporation becomes involved, to which he is not a party, and has not been given an opportunity to defend personally. He is then represented by officers who are not only authorized to take charge of all litigation, but whose duty it is so to do; and why should not those whom the officers represent be held privies in interest, and concluded by the result, in the absence of fraud and collusion? There would seem to be no middle ground on which to place a judgment against a corporation, and, if the stockholders are bound under any circumstances, they must be under all. This is the common conclusion of nearly all of the courts, although their reasons are not always the same. See cases cited in the following text-books: 3 Thompson, Corp. § 3392, 2 Black, Judgm. § 583; 2 Morawetz, Corp. § 619.

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Also 12 Am. & Eng. Enc. Law, 97, note 1. Also Oswald v. Minneapolis Times Co., supra, page 249, 68 N. W. 15.

At the trial an objection was made by defendants' counsel to the introduction in evidence of the judgment roll, upon the ground that the complaint on which the judgment was rendered failed to state a cause of action against the corporation. What has been said hereinbefore covers the claim that the objection should have been sustained. See, also, Lane v. Innes, 43 Minn. 137, 45 N. W. 4, and cases cited.

Taken as a whole, the evidence was sufficient to support the finding that defendant Wilson was a stockholder. The rule is that, where the name of an individual appears on the stock books of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting the presumption, is cast upon the defendant. 1 Cook, Stock. & Stockh. § 55, and cases cited in notes. From some of these cases it will be seen that the rule has been laid down much more broadly than here stated. The reasons why, in opposition to the general rule, entries in the books of a corporation are admissible for the purpose of showing who are stockholders, are well stated in Glenn v. Orr, 96 N. C. 413, 2 S. E. 538, and Liggett v. Glenn, 2 C C. A. 286, 51 Fed. 381. The entries introduced here were found in a stock or share book kept by the corporation. It may not have been the book required by statute,[2] for, although otherwise complete, it failed to show what amount of money had been paid on the shares issued to Wilson. But the rule above stated does not require that the entries introduced in evidence shall be found in a book kept in any particular manner, or that it contain the entries prescribed by statute. It is enough if it be the stock book of the corporation. The book, which showed that a certificate for 500 shares of stock had been issued to H. S. Wilson, supplemented by the identifying testimony of the witnesses Greenwood and James, taken in connection with the fact that defendant Henry S. Wilson offered no testimony tending to deny his membership in the corporation, but seems to have rested upon a belief that plaintiff would fail to connect him with it, made a case for the finding in question.

The claim is made in behalf of the defendants Chapman and Sheridan that there was no sufficient evidence to warrant a finding that

[2] G. S. 1894, § 2599.

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they, or either one, were stockholders in the corporation. The entire stock consisted of 100,000 shares, of which not to exceed one-fourth was set aside as treasury stock, to be sold for cash, the money to be used in developing the property. The balance of the shares was to be divided equally between the four original incorporators, defendants above named and defendants James and Greenwood, in payment or in consideration of four mining leases which they had obtained for the corporation, and also in consideration of services rendered and moneys advanced. This statement of the facts is borne out by the evidence, although there was some dispute over it. These four gentlemen organized the corporation, and were its officers and directors for two years,—so long as it seems to have been alive. They took part in stockholders' meetings, and also had numerous meetings as directors. They secured mining leases, supposed to be of value, and turned them over to the corporation with the understanding that in consideration therefor, and as compensation for their personal services, they should have an equal division of all the shares, less about one-fourth, set apart as treasury stock, to be placed on the market. It was not shown that formal action as to the division of the stock was ever taken, and no certificates were formally issued to these gentlemen, the reason really being that it was generally understood what shares each was to have, and because they did not want shares held by either of their associates to be placed on the market, there to compete with the treasury stock, and depreciate its market price. It is also quite evident from the testimony that these gentlemen were disinclined unequivocally to place themselves in position as stockholders to whom shares had been actually issued, until the success of the corporation was assured, and the danger of incurring individual liability reasonably remote. In order to constitute one a stockholder in a corporation, it is not necessary that the certificate to which he is entitled be issued, for it is merely evidence of his title to the stock shares. 1 Cook, Stock. & Stockh. § 192. See, also, Marson v. Deither, 49 Minn. 423, 52 N. W. 38, and cases.

It was established by the evidence here that these four original incorporators became stockholders in the corporation, unless it was absolutely necessary to show that formal action was taken by the corporation on their proposition. It had been carried out and executed. In consideration and as payment for the mining leases and for mon-

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eys advanced and services rendered, these men had agreed to take all the shares, less those reserved. The leases had been transferred, the moneys advanced, and the services rendered. No stock certificates had been issued for the reasons given, but this was not the test. We do not think that it was absolutely necessary to show that formal action had been taken at a stockholders' or a directors' meeting, whereby these men became stockholders. The testimony presents a case of a fully and mutually executed agreement for the sale of stock to the promoters and incorporators of the corporation, the same having been paid for by the leases, the moneys advanced, and the services rendered. The corporation had been paid for the stock, but the certificates had not been issued or delivered, for reasons personal to those to whom they of right belonged. In the absence of the books and records, all of which, except the stock book before mentioned, had been destroyed by fire prior to the commencement of this action, it may well be inferred from the facts and circumstances that action sufficiently formal had been taken at some of these meetings to constitute these incorporators shareholders in the truest sense. Moss v. Averell, 10 N. Y. 449; Bank of U. S. v. Dandridge, 12 Wheat. 70. Again, it is obvious that these men assumed to be shareholders, and acted as such, because they had really bought and paid for their stock. It is a case for the application of the principles that a party cannot take advantage of his own wrong, and that in equity that will be consdered done which ought to be done. See Basting v. Northern Trust Co., 61 Minn. 307, 63 N. W. 721.

The corporation was organized, not only for the purposes of mining, but also for the business of "buying and selling and dealing in mineral lands." It is not within the terms of the constitutional provision respecting corporations organized for manufacturing or mechanical business. St. Paul Barrel Co. v. Minneapolis Distilling Co., 62 Minn. 448, 64 N. W. 1143, and cases cited; Anderson v. Anderson Iron Co., supra, page 281, 68 N. W. 49.

Order affirmed.

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FRANK M. WATSON v. WILLIAM H. WATSON.[1]

June 29, 1896.

Nos. 9967—(184).

Appeal from Probate Court—Accounting by Guardian.

G. S. 1894, c. 45a, § 4665, which provides for an appeal from an order of the probate court allowing, or refusing to allow, an account of a guardian, was intended to apply to the annual or final accounts rendered and filed in compliance with the preceding sections 4572 and 4573, of the same chapter.

Same.

It was not designed to cover or allow an appeal from an order based upon a finding that an alleged accounting and settlement between a guardian and his ward, made after the latter became of age, had never been had or made.

Appeal by William H. Watson from an order of the district court for Dakota county, Crosby, J., dismissing his appeal from the probate court of said county. Affirmed.

Hubbard & Taylor and *M. H. Sullivan*, for appellant.

Hodgson & Schaller, for respondent.

COLLINS, J. The appellant in this proceeding became the guardian of the respondent in the year 1864, and remained such guardian until the latter attained his majority in the year 1879. In 1894 respondent filed a petition in the proper probate court, setting forth, among other things, that appellant had never made an accounting of his guardianship, and asking that he be required so to do. A citation was then issued by the court, and served upon appellant, requiring him, on a day certain, to appear and show cause, if any he had, why he should not make such accounting. In response to the citation, appellant filed a verified answer, in which he alleged that an accounting and settlement of all matters connected with his guardianship had been made with his ward after the latter became of age, in a certain specified way, which had been acquiesced in by the latter for more than 13 years. He also set forth that by reason of the great lapse of time, during which all of his accounts in respect to the guardianship had been lost or destroyed, whereby it was impossible for

[1] Reported in 68 N. W. 44.

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him to render an account, respondent had been guilty of laches in neglecting to make an earlier demand for an accounting and settlement. He also alleged that the right to demand an accounting was barred by the six-years statute of limitations.

A trial was had, and the court found that no accounting or settlement such as required by law had ever been made between the parties. It then ordered that appellant file in said court, by a day certain, a full and complete account of all his doings and proceedings in said matter, including a full statement of all moneys which had come into his hands and his disbursements in behalf of the ward's estate. From this order, appellant took an appeal to the district court, and there, upon respondent's motion, the appeal was dismissed, on the ground that the order was not appealable. The present appeal is from the order of dismissal.

The right of appeal from the probate court is regulated by G. S. 1894, § 4665, which provides that an appeal may be taken to the district court from

"(8) an order allowing an account of an executor, administrator or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars."

Unless the order is within the terms of this provision, it is not appealable, and the district court ruled correctly. Counsel for appellant concede this, but contend that as there may be a valid and binding accounting and settlement between a guardian and his ward after the latter has become of age, when the probate court found that there never had been an accounting and settlement between the parties, such as is required by law, and ordered that the guardian file a full and true account of his receipts and disbursements, it refused to allow the guardian's account, and its order became appealable under the statute. We cannot take this view of the statutory provisions regulating appeals. We find upon examination of the Probate Code that it provides for the rendition and filing of accounts by guardians once each year, and also for a full and final accounting at the termination of the guardianship. G. S. 1894, §§ 4572, 4573. These are what may be designated as "statutory accountings." It is obvious, when we consider that the Probate Code was designed to cover all matters of practice concerning the estates of minors, that section 4665 refers to, and was intended to apply to, accounts rendered and

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filed in compliance with the preceding statutory requirements, and not to the determination of controversies of the kind now before us.

The guardian's answer did not pretend to be an accounting, but its allegations were by way of excuse, reasons being given why an account should not be rendered. When an account is rendered and passed upon, the guardian may have no cause for complaint, for the court may allow every item of his account. Certain it is that, when it found that no accounting or settlement had ever been had between the guardian and the ward, it did not disallow an account contemplated by the statute.

Order affirmed.

KATHERINA SNEDA, Administratrix, v. ALBERT LIBERA and Another.[1] | 65 337 | 76 310

MICHAEL KULAS v. SAME.

June 29, 1896.

Nos. 9976, 9977—(145, 159).

Master and Servant—Action for Injuries—Negligence—Assumption of Risk—Province of Jury.

In actions based on the alleged negligence of a master towards his servants, arising out of the same accident, tried separately below, but on appeal argued and submitted together, it is *held*, on the evidence, that the question of the master's negligence was for the jury, and also the question of the assumption of risk by the servants, and also whether a certain act said to have been performed by one of the servants in and about the work rendered him guilty of contributory negligence which would prevent a recovery in either or both of the cases.

Expert Testimony—Opinion of Witness.

The general rule laid down in respect to the admission of expert opinion evidence is that the opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.

Same—Sufficiency of Wall.

Held, under this rule, that, in an action growing out of the collapse of a cistern wall while being constructed, the opinions of qualified experts might be received in evidence as to the sufficiency of the wall in respect to thick-

[1] Reported in 68 N. W. 36.

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ness alone, and whether a wall of the thickness of the one in question was strong enough to resist the pressure naturally resting upon it.

Same—Discretion of Court.

The preliminary question whether a witness offered as an expert has the necessary qualifications is for the court, and is largely within its discretion.

Appeals from the district court for Winona county, Gould, J.

In the first action plaintiff appealed from an order denying a motion for a new trial. Reversed.

Brown & Abbott, for appellant.

P. J. McLaughlin and *Samuel Morrison*, for respondents.

In the second action defendants appealed from an order denying a motion for a new trial after a verdict in favor of plaintiff for $3500. Affirmed.

P. J. McLaughlin and *Samuel Morrison* for appellants.

Brown & Abbott, for respondent.

COLLINS, J. These actions, growing out of the same accident, were tried separately, but on appeal were argued and submitted together, and can be considered and disposed of in the same way. The one in which Mrs. Sneda, as administratrix, is plaintiff, was brought to recover damages for the death of her husband, caused, as she claims, by defendants' negligence when constructing a cistern wherein the deceased was employed by them as a brick mason, while that in which Kulas is plaintiff was brought to recover for injuries received by him at the same time, while he was working for defendants as a common laborer. At the conclusion of the trial of the Sneda case the court directed a verdict for the defendants, and she appeals from an order denying her motion for a new trial. Kulas had a verdict in his favor, and defendants appeal from the refusal of the court to grant them a new trial.

It is necessary that a very full statement of the facts be given. Defendants were contractors and builders, and in 1894 entered into a contract with the owners to do certain specified work in and about the convent buildings in the city of Winona. They were also to do such other or extra work as might be ordered by the superintending architect of the owners, who were to furnish all materials. As extra

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work, they were ordered to build a 600-barrel cistern in a designated place, about eight feet distant from one of the buildings. The building was of brick and stone, two stories high, and surmounted by a tower an additional story in height. The subsoil here was sand and gravel, and very easily set in motion by its own weight. The cistern was to be built in accordance with plans prepared by the architect, and these plans required it to be 16 feet in diameter, 18 feet deep, and inclosed in a circular wall eight inches wide, made of brick and cement.

The defendants first caused the earth to be removed where the cistern was to be constructed, leaving the sides of the excavation thus made, sloping so as to be self-sustaining, and to the depth of eight or nine feet. In the center and on the bottom of this excavation, defendants built a circular wooden ring, about 16 feet in diameter, eight inches thick at the top, eight inches deep, and brought to an edge at the bottom, perpendicular on the outside, and caused an eight-inch circular brick wall to be laid on the top of this ring, flush with the outside thereof, thus starting the brick and cement wall of the proposed cistern. After building this circular wall up to a height of several feet, defendants caused the earth to be filled in on the outside of it. The building of this wall was continued until it was 14 inches above the surface of the ground, the plan being to cause the ring to settle and cut its way down as the excavation deepened. When the cistern and wall had been thus sunk to a depth of about 12 feet, the top of the wall having been kept about 16 inches above the surface of the ground, the excavation became more difficult, and could not be carried on so as to cause the ring and wall to settle as fast as the masons were laying the brick, and it became necessary for the masons to wait for the excavation. For this reason, about two days before the accident, defendants laid off the two brick masons (the deceased and one Stanek), and proceeded personally, in the absence of the masons, to excavate the cistern and sink the wall in the manner described.

At the time the masons left the work the cistern wall was moving downward as the excavation proceeded, in the proper manner; but after they had gone, and defendants had proceeded with the sinking of the cistern and wall about 16 inches, the whole wall "hung," and refused to settle any further, supposedly on account of the lateral pressure of the earth around and upon the outside. The defend-

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ants then caused the dirt to be removed from the center of the cistern to the depth of two feet below the bottom of the ring, whereupon a horizontal crack appeared, running around the cistern about two feet above the bottom of the wall. The part of the wall below this crack dropped down and away from the upper part about two inches, leaving the upper part of the wall still hanging. The defendants then caused the earth around the outer side of the upper portion of the wall to be removed to the depth of about four or five feet, placed timbers across the top of the cistern wall, and piled a large quantity of brick upon the timbers, for the purpose of weighing down and sinking the wall, and thus forced the upper part down so that it joined the part which had fallen away. About the time the bricks were placed on the timbers across the top of the wall, several perpendicular cracks or breaks appeared, running from the top of the cistern down for several feet. Defendants then caused five holes to be punched down, close to and outside of the wall, to its full depth, and passed five ropes down through these holes, outside of the wall, under the bottom of the ring, into the cistern, thence up to the top, and joined the ends, forming five perpendicular loops or bonds about the wall. They then placed in each of these loops a stick or lever, whereby they were twisted tight so as to hold the lower portion of the wall to the upper. The dirt which had been dug away from outside of the wall was then replaced. On the side of the wall towards the building the bricks were loosened, and defendants caused a plank a foot wide and several feet long to be placed over these loose bricks, and another plank to be placed perpendicularly against the opposite side of the wall, and placed two braces, 16 feet in length, composed of 2x6 pine planks, across the cistern, nearly parallel, with the ends nailed to these perpendicular planks. In placing these braces in position, they were forced and driven in between the upright planks so tightly that they were caused to bend in the middle, at which point such braces were spiked together. After a short time the shape of the cistern wall so changed that these braces became straight. Defendants, in their efforts to sink the wall, dug out more or less sand from underneath it, which was not replaced. Defendants then caused a carpenter to build another circular wooden ring inside the first one, but similar, so that the top of the new came up to the bottom of the one first put in.

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When this was completed, and the wall was in this condition, defendants sent word to the bricklayers (deceased and Stanek) to come and resume work, and, upon their return, ordered them to build an eight-inch brick wall upon this inside ring until it was built up to the horizontal crack in the outer wall, and then to remove the dirt from the center of the cistern, and build up on the top thereof as fast as the dirt should be removed and the inside wall should settle, keeping the top of this inside wall about even with the crack in the outside. This the masons proceeded to do, Kulas assisting as a common laborer. When the inside wall had been settled to the depth to which the cistern was to be built, the masons removed the cross braces or planks, and proceeded to reduce the inside wall to four inches, and to build it upward. It was claimed by plaintiffs that defendant Libera instructed the masons to remove the braces, and the evidence on this point was conflicting, Libera testifying that he gave no such order. Soon after their removal, Kulas being at work in the cistern with the masons, the loose bricks before mentioned commenced to fall to the bottom of the cistern; considerable sand poured in; and the wall collapsed, or gave way, burying all three. Both masons were killed, and Kulas was seriously injured.

The only information either of the masons had as to what had been done while they were absent was such as they could have gathered from the appearance of the wall, so far as appeared on the trial. It also appeared that the duties of the architect were supervisory. He furnished the plans, and, as the representative of the owners of the premises, ordered defendants to do this particular job of work under the extra clause in their contract. He also made frequent visits to the work, as might be expected, and at times advised with defendants and the workmen. But the latter were employed by, and were wholly under the control of, the defendants,—responsible to them alone, and not in any manner to the owners. Although in the Kulas case the court submitted to the jury the question whether or not the workmen were servants of the defendants, or of the owners of the premises, there was, on the evidence, no such question in the case. Undoubtedly, the relation of master and servant existed between defendants and the workmen.

In the Kulas case the court submitted to the jury the question of defendants' negligence. This was correct, for the general duty of a

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master is to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks. He is required, among other things, to use reasonable diligence in seeing that the place where the service is to be performed is safe for the purpose; and this duty extends, not only to such unnecessary and unreasonable risks as are in fact known to him, but also to such as he ought to have known in the exercise of diligence proportionate to the occasion, and this duty is continuous. Nor can the master avoid his duty, or the liability which arises therefrom, by saying that he acted, when adopting his plans, upon the advice of an architect whom he believed to be competent. On the facts as they appeared upon the trial of each of these cases, there was an abundance of evidence on which to submit the question of the master's negligence to the jury, both as to the plan adopted, and the manner of doing the work. This clearly appears from our statement of the facts, many of which were not in dispute. The evidence tended to show that taking into consideration the character of the soil, the size of the cistern, and the fact that it was being constructed within a few feet of a heavy brick building, the weight of which would exert more or less pressure on one side of the wall, the latter was scarcely half thick enough for the purpose. And it also tended to show that the methods pursued by defendants after the cracks and the loose brick appeared—the latter on the side nearest the building—were hazardous, and invited the disaster. A jury would certainly have been justified in finding that the defendants did not take sufficient precautions when they discovered that the wall gave indications of a tendency to fall apart.

What has been said in regard to the question of negligence on the part of defendants applies to both cases; for, on the facts, no sufficient distinction can be pointed out, arising either from the testimony, or from the fact that Sneda was a skilled brick mason, while Kulas was a common laborer. On this question the Sneda case should have been submitted to the jury; for it is only when there is an entire absence of testimony tending to establish a master's negligence that a court can order a nonsuit.

It is also urged by defendants' counsel that all of the workmen assumed the risk, and therefore no recovery can be had in either case. A servant assumes the ordinary risks of his employment,—such as are reasonably necessary and incidental to it, including negligence of

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fellow servants; and, as a general rule, he also assumes such extraordinary risks as he may knowingly and voluntarily see fit to encounter. But he does not stand on the same footing as his master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. If he did, the servant would always assume the risks. He has a right to assume that the master will do his duty in respect to risks, although this proposition is subject to the qualification that the servant must not rashly or deliberately expose himself to unnecessary and unreasonable risks. And it is one thing to be aware of defects in plans or methods, and another thing to know or appreciate the risks resulting, or which may follow, from such defect. The mere fact that a servant has knowledge of defects in plans or methods of construction may not charge him with contributory negligence, or assumption of risk. The question is, did he know, or ought he to have known in the exercise of ordinary common sense and prudence, that, in addition to the defects, the risks existed? And upon the evidence this question of assumption of risk was for the jury in both cases.

In the Sneda case it is urged that his administratrix cannot recover, because he removed the braces, and was therefore guilty of contributory negligence. In the first place, the jury might have found from the evidence that they were removed by express direction of one of the defendants; and, second, the court could not say, as a matter of law, that this removal caused the wall to collapse. The cause of the accident was an open question, and for the jury to determine. It is also claimed that as Sneda and Kulas were fellow servants, and the accident was caused by the removal of the braces by the former, the latter cannot recover. We have already answered this contention. It follows from what has been said that the trial court erred when it directed a verdict for defendants in the Sneda case, and that a new trial must be had.

We now reach a consideration of certain rulings made by the court when receiving testimony in the Kulas case. The questions to which defendants' counsel made objections were all of the same general character, and called for opinions from the witnesses as to the sufficiency of the wall in respect to thickness alone,—it being admitted that the materials used were of excellent quality, and well put together,—and whether, considering the undisputed facts, a wall

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eight inches thick was strong enough to resist the pressure naturally resting upon it. The objections made by counsel to this class of testimony were that it was incompetent and inadmissible, and, in some instances, that the qualifications of the witnesses to express expert opinions had not been shown.

The preliminary question whether a witness offered as an expert has the necessary qualification is for the court, and is largely within its discretion. And in some states it is held that under no circumstances will the exercise of this discretion be reviewed. 1 Greenleaf, Ev. (15th Ed.) § 440, and note c. All of the witnesses were shown to be, to some extent, qualified to express opinions on the subject concerning which they were questioned, and were clearly brought within the rule first above stated, which we regard as the proper one.

The general rule laid down in respect to the admission of expert opinion evidence is that the opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. On questions of science, skill, and trade, or others of the like kind, persons of skill may not only testify to facts, but are also permitted to give their opinions in evidence. 1 Greenleaf, Ev. § 440, note 4. See, also, Sowers v. Dukes, 8 Minn. 6 (23). As cases bearing upon the admissibility of expert testimony with respect to the strength and sufficiency of the cistern wall, we cite Claxton's Admr. v. Lexington & B. S. R. Co., 13 Bush (Ky.) 636; King v. New York C. & H. R. R. Co., 72 N. Y. 607; Evarts v. Town of Middlebury, 53 Vt. 626; Bemis v. Central Vt. R. Co., 58 Vt. 636, 3 Atl. 531; Pope v. Filley, 9 Fed. 65. The witnesses had superior skill and knowledge as to the resisting powers of a brick wall imbedded in sand in close proximity to great weight, and of what thickness it should be to sustain the pressure. Inexperienced men, such as ordinary jurors, were not likely to prove capable of forming a correct judgment upon such a subject without assistance from the skillful and experienced. There was no error in the rulings challenged by the last seven specifications of error.

The order refusing a new trial in the Sneda case is reversed, and a like order in the Kulas case stands affirmed.

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STATE OF MINNESOTA v. FARIBAULT WATERWORKS COMPANY.[1]

June 29, 1896.

Nos. 10,116—(54).

Appeal—Review of Tax Judgment.

The only statutory mode of reviewing a tax judgment, real or personal, in the proceedings on which it is based, is that prescribed in G. S. 1894, § 1589. County of Washington v. German-American Bank, 28 Minn. 360, followed.

Appeal by defendant from an order of the district court for Rice county, Buckham, J., denying a motion for a new trial. Dismissed.

A. B. Jackson, for appellant.

Robert Mee, for respondent.

COLLINS, J.[2] It was said in County of Washington v. German-American Bank, 28 Minn. 360, 10 N. W. 21, that:

"There is no statute authorizing an appeal like the present from a tax judgment. The only mode of reviewing such judgments is upon a certificate or statement of the facts and of its decision, by the court below, in the manner prescribed by statute. G. S. 1878, c. 11, § 80."

This language is pertinent in this case, which is an appeal from an order denying a new trial after findings of fact and an order for judgment in favor of the state had been filed in proceedings to enforce the collection of a personal property tax. The motion itself was unwarranted. Counsel for appellant contends that the provisions for reviewing mentioned in G. S. 1894, § 1589, are applicable to real-estate judgments only. If this be true, his cause is not helped, for he has simply demonstrated that a party against whom a personal tax judgment has been rendered cannot have the proceedings reviewed in the manner prescribed in that section. The right of appeal is purely statutory, and is not given in the law regulating the enforcement and collection of taxes, real or personal. The results, if such a right was given, would prove exceedingly disastrous and odious. Attention has been called to the fact that an appeal from a personal tax judgment was considered and disposed of on the merits in State

[1] Reported in 68 N. W. 35.

[2] Buck, J., absent, took no part.

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v. Rand, 39 Minn. 502, 40 N. W. 835. No motion to dismiss was made in that case, and that the judgment was nonappealable escaped notice.

Appeal dismissed.

HERBERT W. TOPPING v. ODIN G. CLAY.[1]

June 29, 1896.

Nos. 10,017—(179).

Action on Note—Pleading—Delivery.

In a complaint in an action brought upon a promissory note, wherein it is alleged that defendant made, executed, and delivered the note in question, whereby he promised to pay a specified sum of money to a certain payee therein named, it is unnecessary to allege that the note was delivered to such payee.

Same—Assignment.

An allegation that, in writing, and prior to the commencement of the action, said note had been duly assigned and transferred to the plaintiff, and that he has ever since been the holder thereof, is a sufficient allegation that it has been assigned and transferred by the payee named therein.

Appeal by defendant from an order of the district court for Ramsey county, Willis, J., overruling a demurrer to the amended complaint. Affirmed.

John F. Fitzpatrick, for appellant.

S. L. Howell, for respondent.

COLLINS, J. It would seem that there should be no great difficulty in properly preparing a complaint in an action brought on a promissory note; but to the original complaint herein defendant's counsel successfully demurred, on the ground that it failed to state facts sufficient to constitute a cause of action, 62 Minn. 3, 63 N. W. 1038; and, when plaintiff subsequently amended the defective pleading, counsel again demurred, on the same ground. While we are of the opinion that the demurrer was not well taken, it is proper to say that the method of setting forth so simple a cause of action adopt-

[1] Reported in 68 N. W. 34.

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ed by counsel is not to be commended, and that, by the exercise of slight care, he could easily have avoided the annoyance and delay caused by the interposition of the demurrer.

1. It was not alleged that the note was delivered to the payee therein named. As it was averred that defendant made, executed, and delivered the note in question, whereby he promised to pay a certain sum of money to the order of Joseph P. Topping, the further allegation that it was delivered to Topping was unnecessary. Peets v. Bratt, 6 Barb. 662; Wochoska v. Wochoska, 45 Wis. 423; Churchill v. Gardner, 7 Term R. 596.

2. There was no allegation in words that the note had been indorsed, assigned, or transferred by the payee to plaintiff. The allegation was that, in writing, and before the commencement of the action, the note had been duly assigned and transferred to the plaintiff, and that he has ever since been, and now is, the holder thereof. It could not have been duly assigned and transferred except in the regular and proper way. It could not have been duly assigned and transferred by any one but the payee. So that the averment that it was duly assigned and transferred to plaintiff, and that he had ever since been its holder, included, of necessity, the allegation that it had been so assigned and transferred by the only person who could assign and transfer it,—the payee. Although not directly in point, we call attention to State of Wisconsin v. Torinus, 22 Minn. 272.

Order affirmed.

JOHN J. FLANAGAN v. CITY OF ST. PAUL.[1]

June 30, 1896.

Nos. 9933—(203).

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City of St. Paul—Sale for Special Assessments—Notice of Expiration of Time for Redemption.

The charter of the city of St. Paul provides that land sold on a judgment for certain assessments of taxes for local improvements may be redeemed at any time within five years after the sale. It also provides that a three-months notice of the time of the expiration of redemption shall be published six weeks. The city treasurer attempted to give such notice, which was void,

[1] Reported in 68 N. W. 47.

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for the reasons stated in Bergen v. Anderson, 62 Minn. 232. *Held*, a new notice may be given after the expiration of the five years.

Same—Certificate of Sale Set Aside—Action to Recover Amount Bid.

The charter also provides that when the tax deed or certificate of sale is set aside in any action in which its validity is brought in question, the holder may recover from the city the amount bid at the sale and certain interest. *Held*, the setting aside of the tax deed or certificate in such a prior action is a condition precedent to the right to maintain the action against the city.

Appeal by plaintiff from an order of the district court for Ramsey county, Kelly, J., overruling a demurrer to the answer. Affirmed.

Charles J. Berryhill, for appellant.

E. J. Darragh and *Hermon W. Phillips*, for respondent.

CANTY, J. The plaintiff is the holder of two certificates issued on the tax sale of July 18, 1888, by the city treasurer of St. Paul, which sale was made to enforce payment of taxes assessed for local improvements, under certain provisions of the charter of the city of St. Paul. Notice of the time of expiration of redemption was given in the same manner as in the case of Bergen v. Anderson, 62 Minn. 232, 64 N. W. 561. Therefore, as we held in that case, the notice was void. Notwithstanding that, the city officers, after the end of the five-years redemption period, issued deeds to plaintiff for the parcels of land so sold. He claims that the deeds so issued to him are void, and that the time has passed in which any new notice of the time of expiration of redemption can be given, and that the tax sale has lapsed, and is therefore void. On the strength of these propositions he brought this action to recover back from the city the amount of taxes which he has so paid, and appeals from an order overruling the demurrer of plaintiff to the answer.

We are of the opinion that the order appealed from should be sustained for two reasons:

1. The tax sale satisfied the tax judgment, and, if the sale has lapsed, there is a total forfeiture of the claim for taxes. Sp. Laws 1887, c. 7, subc. 7, tit. 1, § 47, provides that any parcel of land so sold "may be redeemed at any time within five years from the date of the sale by any person having any interest therein. * * *" It also provides that the notice of the time of expiration of redemption, specifying the last day for such redemption, shall be given. The treasurer must ascertain from his records all of the parcels sold for taxes

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which remain unredeemed, and of his own motion proceed to give this notice, which we held in Bergen v. Anderson should be published once a week for six successive weeks, the publication to be complete at least three months before the day specified in the notice as that on which the right to redeem shall expire. If appellant's position is correct, the failure to specify in such notice, as such time, the last day of the five years, causes the tax sale to lapse and become void. As before stated, the judgment has been satisfied by the sale; therefore there cannot be, as appellant contends, a resale on that judgment. It follows that all right to the tax for which the judgment was entered and the land sold would be totally lost and forfeited by reason of any one of a large number of irregularities, oversights, and omissions of the city treasurer. We cannot hold that the legislature ever intended such a result. The statute should be construed so as to prevent a forfeiture, unless it is plain that such is not the intent of the legislature. The utmost effect we can give to the failure of the treasurer to do his duty is to extend the time of redemption to the time specified in a notice properly given, and we must hold that such time may be after the end of the five years.

2. Section 50 of the same act as amended in 1889 (Sp. Laws 1889, c. 32) provides:

"That in any action heretofore or hereafter commenced in which the validity of a deed or certificate of sale issued under this act is brought into question, and on account of any irregularities the same shall be set aside, the party holding such deed or certificate of sale shall recover from the city of Saint Paul the amount paid by the purchaser at the sale, or by the assignee of the city on taking an assignment certificate, with interest at the rate of seven (7) per cent. per annum from the date of such payment. Such amount shall be paid out of the city treasury upon the order of the common council of said city. * * *"

This is the provision of statute on which plaintiff founds his right to recover back from the city the money paid by him, but he does not allege that his tax deed or certificate of sale was ever set aside or held void in any prior action. The statute clearly makes this a condition precedent to the recovery back from the city of the money paid on the tax sale.

The order appealed from is affirmed, but, as respondent did not file its brief three days before the day of argument, as required by the rules of this court, it will not be allowed to tax statutory costs.

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ALFRED E. PUFFER v. CHICAGO GREAT WESTERN RAILWAY COMPANY.[1]

June 30, 1896.

Nos. 9035—(236).

Injury to Employe—Assumption of Risk.

Plaintiff, while employed as a brakeman by defendant in its switch yard, coupling an engine to a train of freight cars, received an injury by having his hand caught between the bumpers. He claims that it was caused by the negligence of the engineer in jerking or suddenly stopping and starting the engine while plaintiff was standing on the footboard at the end of the tender, stooping over (without having a hold of the hand rail) and attempting to make the coupling, while the engine was still in motion, approaching the car, and that such sudden stopping or jerking threw him off his balance, causing him to throw his hand on the bumper of the car, where it was caught by the bumper of the engine before he had time to take it away. *Held*, there was no evidence to show that such sudden stopping or jerking was anything more than ordinarily occurs in the business of switching and coupling cars, the risks of which plaintiff assumed, or to show that the engineer was negligent, and plaintiff cannot recover.

Appeal by defendant from an order of the court for Hennepin county, Belden, J., denying a motion for a new trial on condition that plaintiff consent to a reduction of the verdict to $2,000. Reversed.

J. F. McGee, for appellant.

F. D. Larrabee, for respondent.

CANTY, J. This is an action for damages for personal injury. Plaintiff had a verdict, and from an order denying a new trial defendant appeals. The only question which we will consider is whether or not the verdict is sustained by the evidence.

On May 14, 1894, plaintiff was in the employ of the defendant railway company at Minneapolis, as a yard brakeman; and, in attempting to couple a switch engine to a train of freight cars on that day, his hand was caught between the bumpers, his thumb cut off, and his hand otherwise injured. The engine had just brought the train of cars from another yard, and in doing so the tender end of the engine was run forward, the engine ahead of the train. On arriving at the

[1] Reported in 68 N. W. 39.

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yard the engine was uncoupled and run past the switch. Then the train of cars was, by the action of gravity, dropped in on the switch, and run some distance down the same. The engine then followed, plaintiff riding on the pilot end, which was behind. When the engine was about four car lengths from the train, it was stopped. Plaintiff got off, came around to the tender end of the engine, which was ahead, and stood on the foot board, ready to couple that end of the engine to the rear end of the train of cars. Thereupon the engineer let the engine drop down, by the action of gravity, towards the train.

Plaintiff claims that when he, standing on the footboard, approached within from two to four feet from the drawhead of the car, he reached out and caught the link, when the engine was suddenly reversed and jerked back, which caused him to lose his balance, and in order to save himself he caught the bumper of the car, and that then the engine again came forward and caught his hand between the bumper (or Janney coupler) of the car and the bumper (or "nigger head") of the engine. He claims that the injury was caused by the negligence of the engineer in reversing the engine several times while going an exceedingly short distance, and that defendant is liable. We are of the opinion that the evidence does not sustain the verdict.

A brakeman working in a switch yard, coupling cars and riding around on a switch engine or cars, must expect some amount of sudden stopping, starting, jerking, and slacking of speed of the engine or car on which he is riding. He assumes the risk of a reasonable amount of this when he engages in the business. He is not a passenger entitled to an extraordinary degree of care in having the train completely stopped and kept stationary while he is getting on or off, or moving about, under the direction of the railway company. While the evidence of plaintiff's witnesses tends to prove that there was a sudden interruption in the movement of the engine when within a few feet of the car, and another sudden movement forward against the car, still, from the conditions testified to, it is impossible that these changes of movement were anything more than the ordinary stopping, starting, and jerking of the cars and engine which were constantly taking place in the switching and coupling of cars.

On the trial, plaintiff testified as follows:

"Q. Who was it that caused the engine to start after you got around on the footboard? A. Mr. Wright, the engineer. I gave the signal

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to back up. * * * Q. What did he do in pursuance of that signal? A. Let the engine drop back. * * * Q. It was on a grade? A. Yes, sir; the grade was down towards the car. Q. What rate of speed did he start to back up with? A. Very slow. * * * Q. From that time, after you gave him the signal to back up until after you received your injuries, state whether or not you gave the engineer any other signal. A. I did not. Q. What did you do? A. There was a Janney coupler in the car we were coupling onto, and there was a link in it, and I pulled the pin on the engine with my right hand, and when we were within three or four feet of the car, I reached out and caught the link with my left hand; and when I was in the act of entering the link the engine swerved or jerked away from me, causing me to lose my balance and to throw my whole weight on my left hand, and before I could recover myself the engine jumped back against the cars, and caught my left hand between the Janney coupler, which was the drawbar on the standing car, and the 'nigger head,' which was the draw on the engine. I don't know of my own knowledge what did cause the engine to jerk. I had not given any signal to the engineer at that time. * * *"

Cross-examination:

"Q. Supposing, in the judgment of the engineer, he is coming back too rapidly; does he have a right to check his engine? A. Why, certainly he has. * * * Q. If, in his opinion, his engine is coming back too rapidly against a train of cars, hasn't he a right to check that engine without consulting the wish of the switchman? A. Yes, sir; if he is too close to the cars. * * * Q. How far was the tank end of the engine from the Janney coupler on this car it was about to be coupled onto, when you first noticed any movement of the engine in the way of checking or starting? A. That was after I had taken hold of the link, and was almost in the act of making the coupling. It wasn't more than three feet,—between two and four feet. Q. What was the motion of the engine at that time? A. The engine lurched away from me, and I was leaning out. Q. Were you leaning over the Janney coupler? A. I was leaning over. I held the link in the Janney coupler, and the engine jerked away from me, and caused me to lose my balance and throw my weight on this link in the Janney, and that is all that held me. And then the engine jumped against the car. She came right against the cars before I could recover my balance and get out of the way,—get my hand off the link. Q. When she jerked, how far away from the cars did she jerk? A. She didn't jerk away from the cars. She just swerved. I don't know whether she stopped, or whether she jerked away from the cars, but she didn't go any distance. I don't think she went six inches. I don't know. It was all done so quick, I don't know. Q. Then it was thrown the other way, and came back? A. Yes, sir; there was a heavy iron railing that went across the back of the engine, running from one side of the tank to the other, standing out from the end of the tank about four inches, and was

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about as thick as that gas pipe there. Q. What was that on there for? A. It was on to have hold of,—to get on and off with. Q. Was it on there to enable switchmen to take hold of it in coupling cars? A. No; it wasn't. I swear to that. Q. It wasn't there for that purpose? A. It wasn't there for that purpose, and it wasn't used for that purpose by switchmen. * * * Q. If I understand you, it [the engine] was barely in motion. Is that so, or was it coming very slowly? A. Very slowly; yes, sir. * * * Q. How long did you say it was from the time the engine surged forward, as you say, until the backward motion came? A. The same instant,—just as though she had been thrown forward and back immediately, almost in one motion."

This is substantially all the evidence in the case to show that the engine jerked. Thomas Riley, the fireman at the time, was called as a witness by plaintiff, and testified that, when the engine was within the length of a car and a half of the end of the car, the engineer reversed the lever to the opposite direction from which the engine was running, and after running about a car length, or a half a car length, threw the lever back again, and again reversed it about the time the engine struck the car, when plaintiff cried out, indicating that he was hurt. But Riley nowhere testified that the engine jerked, or moved irregularly in any manner. He also testified that the engine ran very slowly down the grade, was running very slowly when the coupling was being made, and that neither he nor the engineer could see plaintiff at the time.

We have quoted the evidence at considerable length for the purpose of showing the character of case made by plaintiff. Plaintiff testified that he stood on the footboard of the moving engine, and, without steadying himself by holding onto the hand rail which extended along the end of the engine, he stooped forward while the engine was still in motion, and took hold of the link on the car. Surely a very slight jerk or slackening of speed of the engine would be sufficient to throw him off his balance while he was in this position. What else had he a right to expect that a careful engineer would do about that time, except to slack up or stop just as he reached the car to be coupled onto? Plaintiff's statement that the hand rail was not there to hold onto while he was standing on the moving engine, leaning over, counts for nothing. No court can hold that it was the duty of the engineer to stop the engine so slowly and evenly that it would not unbalance a man standing in that position.

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But, even if plaintiff did intend to convey the idea that there had been a violent and extraordinary jerking of the engine, his evidence does not show it. This ponderous engine, running slowly down this slight grade by the force of gravity, and with no steam in the cylinders, as all his witnesses testify, could not jump back from under him a few inches or a foot, and then jump forward again and strike the bumper of the car with all the agility of a cat; the space crossed by the jump being so short that plaintiff's feet rested all the time on the footboard of the engine, and his hand on the bumper of the car, and the time of the double jump of the engine being so short that he, an able-bodied man, competent and fit for the business, did not have time to raise up and regain his balance, or take his thumb out of the way. Of course, if the engine struck some ponderous obstruction, such as this train of cars with the slack all taken out from between them, the engine would be very likely to recoil as quickly as plaintiff claims it did; and, if he was standing in the position he says he was, he would be very likely to lose his balance as he says he lost it. But he could not recover in that case, as the engine would not, at the rate it was moving, be stopped any more suddenly or violently, or with any less care, than it is usually stopped when it strikes against the cars to which it is being coupled.

The only persons who were about the engine, to testify to what occurred, were the plaintiff; the fireman, Riley; and the engineer, Wright. The latter testified for defendant that there was no jerk or interruption at all, but the engine moved down slowly until the bumpers struck, and plaintiff called out in distress. Then, taking the testimony of plaintiff and Riley alone, it does not show that there was any extraordinary jerking of the engine. Riley nowhere testifies that the engine jerked, and plaintiff's statement that it gave the short, double-action, six-inch jerk cannot be given any effect beyond showing that there had been an ordinary slacking, jerking, or stopping of the engine about the time that the engineer might reasonably suppose that the bumpers would strike. He could not see the coupling apparatus or the plaintiff, as the latter was standing down on the footboard below the end of the tender. Therefore the engineer was not likely to make a very close guess as to the exact distance he should move the engine, and might well stop or slack up before reaching the point where the coupling could be made; and, if the plaintiff stood in

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the position he says he did, this would naturally throw him off his balance. But the fact that he was so thrown off his balance while in that position is not sufficient to show that the engineer was negligent. Indeed, it would be an extraordinary engineer who could, every time he tried, run that engine down to that car and stop it so evenly and gradually that he could make the proper contact for coupling without unbalancing a man standing as plaintiff was on that footboard,—stooping over without having a hold on the rail.

Plaintiff called as an expert an engineer who testified that running an engine down grade by the force of gravity, with the lever reversed, will cause the pumping of air into the cylinders and stop the engine, and that when the lever is again reversed the compressed air in the cylinders will cause the engine to jump or jerk forward. But we cannot allow expert evidence as to what might happen to stand as proof of what did happen, especially as it is not probable that there was either momentum enough in this engine, or descent enough in this grade, to furnish sufficient motive power to compress enough air in the cylinder of this engine to cause her to do any more jumping or jerking than an engine ordinarily does in switching and coupling cars.

The order denying a new trial is reversed, and a new trial granted.

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JOHN ALBERT BARG v. E. F. BOUSFIELD and Another.[1]

June 30, 1896.

Nos. 9985—(218).

Action by Infant for Personal Injuries—Discretion Required—Contributory Negligence.

Rule applied that a youth between 15 and 16 years of age is required to exercise the amount of discretion which a person of his age and experience should exercise, and no more, and whether plaintiff was guilty of contributory negligence *held* to be a question for the jury.

Same—Negligence of Master—Failure to Warn.

Whether or not his employer was guilty of negligence in failing to instruct such youth, and warn him of the dangers of working around machinery with which he was not familiar, *held* a question for the jury.

[1] Reported in 68 N. W. 45.

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Same—Independent Contractor or Agent.

Rule applied that, where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor, but the agent of that other, who is responsible for his acts and omissions within the scope of his authority.

Same—Indemnity Policy—Defense by Insurer—Admissibility of Evidence.

Plaintiff was employed in defendants' establishment by one Scott, was injured by the latter's negligence, and brought this action to recover damages for the injury, claiming that he was defendants' servant, and Scott was their agent. They denied this, and claimed that Scott was an independent contractor, and plaintiff was in his employ. On the trial, the court received evidence showing that defendants held an indemnity policy, indemnifying them, and holding them harmless "to a certain extent" from liability "by reason of any injury to any employés, including this plaintiff or anybody else that might be in any part of the mill working in that factory," and that the company issuing the policy had undertaken to defend, and was defending, this action for defendants. Nothing further appeared as to the contents of the policy, and it did not appear that such insurer undertook, by the policy, to defend the defendants in all cases in which they might be charged with any such liability. *Held*, the evidence was admissible, as tending to show that the defendants did not regard Scott as an independent contractor.

Rulings Considered.

Other unimportant rulings considered and disposed of.

Verdict not Excessive.

Held, the verdict as it now stands is not so excessive that this court would be justified in granting a new trial.

Appeal by defendants from an order of the district court for Hennepin county, Jamison, J., denying a motion for a new trial. Affirmed.

Keith, Evans, Thompson & Fairchild, for appellants.

F. D. Larrabee, for respondent.

CANTY, J. This is an action for personal injury. Plaintiff had a verdict, and from an order denying a new trial defendants appeal.

The defendants are engaged in the business of manufacturing wooden tubs, pails, and other wooden ware. On April 27, 1894, plaintiff, then an infant between 15 and 16 years of age, was employed in their establishment by one Scott, who had charge of one department of the business, and who put plaintiff to work carrying wooden bottoms from the car over to one of the saws. Under one of the saws was placed a

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tub to catch the splints, scraps, and sawdust which fell from the saw. When the tub was full, Scott ordered plaintiff to take it away from under the saw. In attempting to do so, he put his right hand between the pile of refuse in the tub and the under side of the rapidly revolving saw, when his little finger, the next one, and the middle finger below the middle joint were cut off by the saw. Plaintiff claims that he had never worked around machinery before, did not know or appreciate the danger of doing so, and was not instructed or warned as to these dangers. He claims that Scott was negligent in failing to inquire as to his knowledge of these dangers, and in failing to instruct him as to the same, and that defendants are liable for Scott's negligence. On the trial, plaintiff testified that there was, or appeared to be, about five inches of space between the pile of refuse and the saw.

"Q. How far from the splints up to the saw? A. About five inches. * * * Q. Well, how did you happen to get your hand cut, and what were you doing? A. I was going to squeeze the splints, and the saw came down further than it appeared to come."

1. We cannot hold, as a question of law, that he was guilty of contributory negligence. It may well be that a boy of his age, who had never worked around such saws, and was not familiar with them, would fail to realize that the teeth of a rapidly revolving saw are invisible, and would fail to learn that there was any danger in putting his hand where he could see nothing to interfere with it. He had worked in the factory only about one hour after he was hired until he was injured. The law did not require him to exercise the care and discretion that a person of mature years should. It required him to exercise such care and discretion as a boy of his age and experience should exercise, and no more. Wood, Mast. & Serv. § 350. Whether he exercised this amount of care and discretion was, on the evidence, a question for the jury.

2. We are also of the opinion that it was a question for the jury whether or not Scott was guilty of negligence in failing to instruct the boy, and warn him of the dangers before sending him to empty the tub. Kaillen v. Northwestern Bedding Co., 46 Minn. 187, 48 N. W. 779.

3. The next question in the case is whether the jury were justified in finding, from the evidence, that Scott was the agent or servant of defendants, so that they are responsible for his negligence. It ap-

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pears by the uncontradicted evidence that Scott took the work of which he had charge by the piece. Defendants paid him a fixed price for a specified amount of work, and he hired the other employés under him, paid them himself, and retained the profits or suffered the losses which were the difference between the fixed contract price which he received and the amount of wages which he paid. He carried on his operations in one room of defendants' factory. They furnished the machinery, the power, and the material, and there is ample evidence to sustain a finding that they reserved and exercised complete control over the manner of performing the work. The defendants are partners, and each personally superintended, more or less, the work in or about the factory. For a part of this work they employed the laborers themselves, and they let other portions of the work to different parties, on similar terms to those on which they let the part that was let to Scott.

The defendant Bousfield was called for cross-examination, and testified as follows:

"Q. And Mr. McVoy is the superintendent? A. Yes, sir. Q. And in all departments it is done subject to his approval, and he has a right to order it to be done a certain way, has he not, or not to be done a certain way? A. In a general way, yes. Q. It is all done subject to him? A. He has general supervision of the whole business. Q. And this man Scott was under him? A. Yes. Q. And had to do the work subject to his approval? A. Yes, sir. Q. And he had authority to stop Scott, and make him do it in a different way, didn't he? A. Yes. Q. And make him do it as he wanted it done? A. Yes, sir. Q. Now, what department was under Scott? A. What we call the bottom and cover department. * * * Q. You said that all the work done by Scott and those under him is all done subject to the approval of the superintendent, McVoy? A. I say all that Mr. Scott does is subject to the approval of Mr. McVoy. Q. All that is done by Scott individually and those working under him? A. Yes. Q. And McVoy has authority at all times to superintend the work, has he not, * * * and all portions of it? A. He has. Q. And has a right to direct when things shall be done? A. He has; yes, sir. Q. When they shall be done, and how they shall be done? A. Yes, sir. Q. And the manner in which it shall be done? A. Yes. * * * Really he hasn't any authority to say one word to that boy, you may say. He should do it through Mr. Scott. Q. You say he has no right to boss those boys at all? A. No. Q. But he has a right to say to Scott: 'You must not have it done this way, you must have it done so and so.' That is right, isn't it? A. That is right,—do it through Scott. * * * Q. What

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does he [McVoy] go in there at all for? A. To know what is going on, and get a general supervision. He has general supervision of the whole of it. Q. What do you mean by saying he has general supervision? A. To see that everything is going right. Q. In what respect? A. To see that they are using our materials properly. Q. In what way? A. And not wasting it. Q. Well, what other respect? What right has he there, except to see that he is not wasting material? A. To see that we get,—well, certain results. Q. And in what other respects? A. Well, to see that things are going right generally. Q. Every respect? A. In every respect; yes. Q. Suppose they are not going right in anv respect whatever, then what? A. It would be his duty to call the contractor's attention to it. Q. And what would he do? What authority would he have over the contractor in a case of that kind? A. If he did not comply with it, he could discharge him. Q. Then he had a right to make him do things just as you wanted them done? A. Certainly. Q. Not only one thing, but every thing in connection with his work there,—he had a right to make him do it just as you wanted it done? A. Certainly. Q. You reserved that right there to make him do it just as you wanted it done? A. Always. Q. In every particular? A. Yes, sir. * * * Q. But, in exercising the right, to exercise that privilege to get a right result, you did have the right to direct him, and control him in every particular, in the doing of that work and in the management and use of the machinery, and, if he didn't obey your orders, you had a right to discharge him? A. Mr. Scott? Q. Yes, sir. A. Yes, sir."

It is true that, on redirect examination, Bousfield repeatedly asserted that neither he nor McVoy had any control over Scott, except to see that he accomplished a certain result; but the effect to be given to the contradictory statements of the witness was a question for the jury. The testimony of the defendant McVoy was of somewhat the same character. There was also evidence tending to prove that Bousfield had stated to other parties that plaintiff was working for him at the time of the injury. While the undisputed evidence shows that Scott was to some extent a contractor, yet the jury were justified in finding, from the evidence, that he was not so far an independent contractor that defendants were not responsible for his acts.

"The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 1 Shearman & R. Neg. (4th Ed.) § 164.

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The evidence tends to prove that Scott represented the will of the defendants, not only as to the result, but also as to the means to accomplish that result.

4. The following rulings of the court, made on the cross-examination of Bousfield, are assigned as error:

"Q. You had what is known as an accident insurance policy,—your firm,—did you not, for which you paid a consideration, and by which this insurance company agreed to indemnify you, and hold you harmless to a certain extent by reason of any injury to any of the employés, including this plaintiff or anybody else that might be in any part of the mill working in that factory, did you not? (Objected to as incompetent, irrelevant, and immaterial. Overruled, and exception.) A. We have such a thing. Mr. Evans: Was that policy in writing? A. Yes, sir. Mr. Evans: We make the further objection to this testimony, as to the character of that policy, as incompetent, irrelevant, and immaterial. The Court: Well, there is nothing before the court now. The question was asked and answered. Q. And under and by virtue of that policy this case is being defended here by these attorneys, is it not? (Objected to as incompetent, irrelevant, and immaterial. Overruled, and exception.) A. I am spending my time here. Mr. Evans: And on the further ground that the terms of that policy appear to be in writing, and that writing is not here. The Court: I think he may answer the question. Mr. Evans: Exception. A. That is the case, I believe. Q. It is by virtue of that contract that they are appearing here, defending this case,—the insurance company? A. Yes, sir. Mr. Evans: The same objection and exception."

Evidence of this character is highly prejudicial, and it certainly was error to admit it unless it was competent. But we cannot say that it was not competent. Except as above stated, the nature of the indemnity furnished to defendants did not appear, but it seems to us that the evidence had some tendency to prove that defendants regarded themselves liable for the negligence of Scott, and the insurance company did, also. It does not appear that the insurance company undertook by the policy to defend the defendants in all cases where they were charged with any such liability, and we cannot so presume. It is fair to presume that defendants required the insurance company to defend them. It seems to us that the conduct of defendants in this respect had some tendency to show that they did not regard Scott as an independent contractor, and, as to that issue, we are of the opinion that the evidence was admissible. The objection that the evidence was secondary came too late to affect the

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first questions, and it had no application to the subsequent questions, because they did not call for the effect or contents of any written instrument.

5. There was evidence in the case tending to prove that the saw was partly covered, and defendants assign as error the refusal of the court to charge that, if the jury found that the saw was covered, plaintiff could not recover. The saw was not covered at the point where plaintiff's hand came in contact with it, and the question of whether it was covered at some other point is not decisive of the case. Therefore the request was properly refused. Appellants assign as error the refusal of the court to charge a number of other requests. But all the questions worthy of consideration involved in such refusal have already been disposed of.

6. The refusal of the court below to grant a new trial on account of excessive damages is also assigned as error. The jury awarded plaintiff the sum of $5,125, and, on the motion for a new trial, the court ordered that the same be granted unless plaintiff, in writing, would remit all above $4,000, which he did. We cannot say that, on the evidence, a verdict for $4,000 is so excessive that this court should interfere to set it aside.

This disposes of all the questions raised having any merit, and the order appealed from is affirmed.

HARVEY S. BEDELL v. EDGAR A. FRADENBURGH and Others.[1]

June 30, 1896.

Nos. 10,016—(209).

Construction of Will—After-Acquired Property.

A certain will construed. *Held*, it did not dispose of a certain parcel of real estate acquired by the testatrix after the making of the will, and that as to such real estate she died intestate.

Appeal by plaintiff, as executor and trustee of the will of Carrie R. Fradenburgh, deceased, from a judgment of the district court for Ramsey county, entered in pursuance of the order of Otis, J. Affirmed.

[1] Reported in 68 N. W. 41.

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Flandrau, Squires & Cutcheon, for appellant.
John V. L. Dodd, for respondent Edgar A. Fradenburgh.

CANTY, J. This is an action brought by the executor for the purpose of obtaining a judicial construction of the will of his testatrix. The will was made on April 27, 1893. Thereafter, on October 23 of the same year, the testatrix purchased and had conveyed to her a city lot in St. Paul, in this state. Thereafter, in April, 1894, she died. The question is whether this lot is disposed of by the will, or whether, as to such lot, she died intestate. The facts are all set out in the pleadings, and the court below held that she died intestate as to the lot. We are of the same opinion. G. S. 1894, § 4425, provides:

"All property acquired by the testator after making his will shall pass thereby in like manner as if possessed at the time of making the will, if it appears by the will that such was his intention."

We can discover no intention in the will in question to dispose of this lot. The will makes no special reference to after-acquired property at all, and there is in it no general or specific clause under which the lot would pass, even if she held and owned it at the time she made the will. The testatrix never had any children. She left surviving her, her husband, the defendant Fradenburgh, and her sister, the defendant Rose.

The first subdivision of the will provides as follows: "First. In case I die leaving no child or children, I give to my husband" certain household furniture and certain real estate in Rome, N. Y., all of which is fully described. By the second clause she bequeaths certain personal property to her sister. The third clause provides as follows: "Third. In case I die leaving no child or children, I give, devise, and bequeath to my executor hereinafter named, in trust, all my personal property and estate not hereinabove disposed of, and all my real estate and property, and interest in real estate and property, of whatever kind soever, situate and being in Toledo, Ohio, for the purpose of paying my debts, and of dividing, distributing, and settling my estate as hereinafter directed and provided." It then proceeds to provide for the holding by the executor of said property in trust for minor matters not material here, and also in trust for the defendant Rose during her lifetime, and remainder to her issue, but, if she leave none, then two-thirds of the same to some other parties, and one-third

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to the defendant Fradenburgh if he be then living, and, if not, then to such other parties. The fourth clause provides as follows: "Fourth. In case I die leaving a child or children, then and in that case I direct my executor and trustee hereinafter named to sell, dispose of, and convert into money all property which I have by the first item of this will given to my husband, and to use, apply and pay over all the interest and income, rents, issues, and property of all my estate, both real and personal, for the support, education, and maintenance of my said child or children." It further provides that when such children shall each arrive at the age of 21 years, "he or she shall receive his or her portion of my said estate, which estate is to be equally divided between such children." But if she leave no children, or if they all die before arriving at the age of 21 years, it further provides: "All my estate which shall remain at the death of" the last of such children shall be "distributed as provided in and according to the terms and provisions of the first, second, and third items or clauses of my said will." These are all of the provisions of the will material here.

It is contended by appellant that, construing all of the clauses of the will together, they show an intention on the part of the testator to dispose of all the property which she would have at the time of her death. In our opinion, we are not at liberty thus to construe together all of the clauses of the will. The testatrix never had any children, so the fourth clause never took effect at all. And if it had taken effect, it would evidently have revoked the other three clauses. But even if we could construe all of the clauses together, it would not accomplish the result contended for by appellant. While the fourth clause of the will uses the terms, "all my estate, both real and personal," and "all my estate which shall remain at the death of" my children, the third clause uses no such broad language with reference to the real estate. It uses the language, "all my personal property and estate," which does not cover any real estate at all, and the language, "all my real estate and property and interest in real estate and property of whatever kind soever, situate and being in Toledo, Ohio." The property here in question is not in Toledo, Ohio, and therefore is not disposed of by this language. There is no other language in the will which has disposed of this lot, and we cannot make a new will for the testatrix.

Judgment affirmed.

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JOHN H. UPHAM v. HENRY P. BARBOUR.[1]

June 30, 1896.

Nos. 10,096—(223).

Pledge of Stock—Conversion by Pledgee.

Where the pledgee of stock put it out of his control, by canceling the certificates and reissuing the stock to a third party to hold as security for the completion or consummation of another and different contract, without the pledgor's consent, *held*, such pledgee was guilty of conversion.

Same—Option to Buy—Action for Price.

The pledgee had an option to purchase the stock at a specified price. *Held*, the pledgor might elect to consider the conversion as an exercise of the option, and sue to recover such price.

Appeal by defendant from a judgment of the district court for St. Louis county in favor of plaintiff for $2,488.11, after a trial before Ensign, J., and a jury. Reversed.

R. R. Briggs, for appellant.

Cash, Williams & Chester, for respondent.

CANTY, J. The principal question involved in this case is whether plaintiff is guilty of converting to his own use defendant's stock.

On March 18, 1893, the defendant was the owner and holder of 4,000 shares of the capital stock of the Standard Ore Company, a corporation. On that day he borrowed of plaintiff the sum of $2,000 for which he executed to the latter his promissory note for that amount, and at the same time, and as collateral security for the loan, indorsed all of the certificates of said stock in blank, and delivered them to plaintiff. Plaintiff held these certificates until November 10, 1893, at which time the note was past due. On that day, plaintiff, as he testifies, "loaned this stock" to one Bates, the secretary of the corporation, and delivered the same to him for the purpose of having the certificates canceled and the stock reissued to one Fackenthall, who was the agent of the Thomas Iron Company, a foreign corporation. At this time the two corporations were making a contract whereby the ore company agreed to sell certain iron ore to the iron company,

[1] Reported in 68 N. W. 42.

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and give the latter an option to take an assignment of the lease of the iron mine of the former; and in consideration thereof the latter had loaned or advanced to the former some money, and agreed to advance it some more. The parties deemed it necessary that this contract should be ratified at a meeting of the stockholders, which could not be called on less than ten days' notice. In order to insure the iron company that the agreement would be so ratified, a majority of all the stock of the ore company was, by a number of those holding such stock, transferred to Fackenthall, under an agreement that he should hold and vote the same at such meeting; and accordingly such a meeting was called, and he, by proxy, voted all of this stock in favor of a ratification of such contract, which was accordingly ratified. Plaintiff, as a part of this arrangement, transferred defendant's stock to Bates as aforesaid, and a large number of other shares of his own, and the certificates were all canceled, and new certificates issued to Fackenthall accordingly; plaintiff retaining no stock in the corporation, except one share of his own, which he voted at the meeting. After the meeting all of this stock was returned by Fackenthall, and, at plaintiff's request, reissued to Bates. Defendant never consented to any such use of his stock by plaintiff.

This action was brought to recover the amount due on the promissory note. Defendant set up a counterclaim for the conversion of his stock, and, on the trial, proved the above facts by evidence wholly uncontradicted. The court held that the facts did not constitute a conversion, and ordered a verdict for plaintiff for the full amount of the note, and from the judgment entered thereon defendant appeals.

Whether or not, if plaintiff had always kept this stock, or even a sufficient amount of the same kind of stock, within his actual control, though in the name of a third person, he would not be guilty of conversion, as some of the cases seem to hold, is a question we need not decide. It clearly appears that he did not keep it within his control. It is the duty of the pledgee to keep control of the pledge, so that at any time the pledgor pays the debt the pledgee will be ready to return the pledge; and if he does not so keep it, but puts it beyond his control, he is guilty of conversion. If defendant had paid his note during the time that Fackenthall was holding this stock to protect the interests of the iron company, plaintiff was not in a position to return the stock. Then the uncontradicted evidence shows that plaintiff was

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guilty of conversion. The fact that the ore company was in great straits, and it was necessary to make the arrangement that was made with the iron company and Fackenthall, in order to preserve its assets, does not change the result.

2. On the back of the note in suit, which describes the stock, defendant, at the time it was made, indorsed the following:

"It is hereby understood that the holder of this note has the option to purchase at any time during the life of this note two thousand shares of the stock described herein as collateral, at seventy-five cents per share. Henry P. Barbour."

Defendant, in his counterclaim, alleges that plaintiff elected to purchase, and did purchase, these 2,000 shares, at such price of 75 cents per share. Defendant now contends that, by the conversion of the stock, plaintiff elected to exercise this option, and purchase these 2,000 shares at that price. Even though the stock was worth more than 75 cents per share, defendant could not recover as damages any more than that sum, because, while plaintiff held a valid option to purchase for that sum, defendant could not be damaged in any greater sum by plaintiff's conversion of the stock. But there ought to be some mutuality in the rule. It ought not, under all circumstances, to favor the wrongdoer. If he can take advantage of his option to reduce the damages when the value is above the option price, he ought to be held to the option price when the value is below it. Then we are of the opinion that defendant may elect to consider the conversion as an exercise of the option, to the amount of the 2,000 shares. This disposes of the case.

The judgment is reversed, and a new trial granted.

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ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY v. MICHAEL BROULETTE.[1]

July 3, 1896.

Nos. 9882—(142).

Railroad Grant — Extension of Time — Sp. Laws 1877, c. 201 — Sp. Laws 1878, c. 71.

Sp. Laws 1877, c. 201, approved March 1, relating to the extension of the time for the completion of the St. Paul & Pacific Railroad Company's Extension Lines, as amended by Sp. Laws 1878, c. 71, construed and *held* that, to entitle a party to the benefit and protection of the provisions of section 10 of the original act, he must have settled upon the land claimed on or prior to March 1, 1877.

Appeal by plaintiff from parts of a judgment of the district court for Polk county, in favor of defendant, entered in pursuance of the findings and order of Ives, J. Modified.

M. D. Grover, *A. C. Wilkinson*, and *Thos. R. Benton*, for appellant.

H. Steenerson, for respondent.

START, C. J. This is an action of ejectment to recover from the defendant the possession of the S. E. ¼ of section 3, township 150, range 45, in Polk county in this state. This land is within the indemnity limits of the grant to the territory and state by acts of congress of March 3, 1857,[2] March 3, 1865,[3] and March 3, 1871,[4] to aid in the construction of certain railroads, and was patented to the state of Minnesota by the United States February 13, 1889, and deeded by the state to the plaintiff March 13, 1889. The defendant claims that in the spring of 1877 one Frank Robert made improvements upon the land, consisting of breaking, and on November 1, 1877, the defendant purchased such improvements from Robert, who delivered possession of the land to him, and that on March 1, 1878, he commenced the erection of a dwelling house on the east half of the land which he then and still claims as a homestead; that in April, 1878, his house was completed, and he moved into it, and has ever since

[1] Reported in 67 N. W. 1010.
[2] 11 Stat. 195.
[3] 13 Stat. 526.
[4] 16 Stat. 588.

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occupied such east half of the premises with his family. The trial court found that plaintiff was the owner of the west half of the quarter section in question, and that the plaintiff held the legal title to the east half thereof in trust for the defendant, and directed that it convey the same to the defendant. Judgment was entered accordingly, from which the plaintiff appealed.

Counsel for the plaintiff, in his brief and argument, has discussed a number of propositions, but, in the view which we take of the case, there is but one question which it is necessary for us to decide, viz.: Has the defendant established a claim to the land here in question, under the provisions of Sp. Laws 1877, c. 201, as amended by Sp. Laws 1878, c. 71? If he has, the judgment of the district court is correct; otherwise, it must be modified. The plaintiff holds the legal title to the land; hence the burden was on the defendant, although he is in possession, to establish his claim.

Sp. Laws 1877, c. 201, was approved March 1, and is entitled "An act to provide for the completion of the lines of railroad commonly known as the St. Paul and Pacific Extension Lines." The uncompleted lines referred to in this title were one from Watab to Brainerd, and one from St. Cloud, via Crookston, to St. Vincent. At this date the time limited in which such lines were to be completed in order to secure the land grant had expired, and the right to declare the lands forfeited for noncompliance with the conditions of the grant was absolute. St. Paul, M. & M. R. Co. v. Greenhalgh, 26 Fed. 563, 139 U. S. 19, 11 Sup. Ct. 395. By sections one to five, inclusive, of the act, the grants of land appertaining to the Watab and Brainerd line were forfeited, and provisions made for regranting the lands to whatever company might undertake the construction of the line. Sections six and ten of the act refer to the second-named line, and are the only ones here material. The material provisions of sections six and ten read thus:

"Sec. 6. The time for the completion of the uncompleted portions of the line of railroad extending from St. Cloud to St. Vincent, commonly known as the 'St. Vincent Branch of the St. Paul and Pacific Extension Lines,' is hereby extended as follows: From Melrose to Sauk Center, until July one (1), A. D. one thousand eight hundred and seventy-eight (1878); from Sauk Center to Alexandria, until January one (1), A. D. one thousand eight hundred and seventy-nine (1879); from Alexandria to Fergus Falls, and from Crookston to St. Vincent,

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until January one (1), A. D. one thousand eight hundred and eighty (1880); from Fergus Falls to Glyndon, until January one (1), A. D. one thousand eight hundred and eighty-one (1881). Provided, however, that such extensions of time are made subject to all the provisions of this and of the succeeding sections of this act."

"Sec. 10. The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entry—not to exceed one hundred and sixty (160) acres to any one actual settler; and the governor of this state shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise."

These sections, in effect, declare a forfeiture pro tanto of so much of the land lying within the granted or indemnity limits of the railway line in question as any person had in good faith settled upon, and made or acquired valuable improvements thereon, on or before March 1, 1877, the day the act became a law, and condoned as to the balance of the land the default to complete the line within the time previously limited, by extending the time for its completion. It was only as to land settled upon by bona fide actual settlers that a forfeiture was declared. It is clear that the defendant did not acquire any right to the land here in dispute by his purchase of Robert's improvements, for the trial court did not find that Robert made any improvements on the land on or prior to March 1, 1877; it simply found that in the spring of 1877 he made the improvements. The finding would be correct if the improvements were made at any time during the months of March, April, or May. The evidence is undisputed that Robert was neither the head of a family nor 21 years of age when he made the improvements. He did not attain his majority until April 26, 1879, and never was an actual settler on the land, bona fide or otherwise. It follows, then, that, if the act of 1877 had not been

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amended by the act of 1878, the defendant would have no claim to the land. We understand his counsel to concede this. He says in his brief:

"We concede that Broulette was not within the original act, but insist that he is within the amended act, and therefore, as to this case, the whole act of 1877 is in effect re-enacted by the act of 1878, not one section, but the whole act."

Sp. Laws 1878, c. 71, was approved March 9, and is entitled "An act to amend chapter two hundred and one of the Special Laws of one thousand eight hundred and seventy-seven," adding the title of the latter act. Section one of the act of 1878, so far as here material, reads as follows:

"Section 1. Section six (6) of said act is hereby amended so as to read as follows: 'Sec. 6. The time for the completion of the uncompleted portions of the line of railroad extending from St. Cloud to St. Vincent, commonly known as the St. Vincent Branch of the St. Paul and Pacific Extension Lines, is hereby extended as follows: From Melrose to Sauk Center, until August one (1), A. D. one thousand eight hundred and seventy-eight (1878). From Sauk Center to Alexandria, until December one (1), A. D. one thousand eight hundred and seventy-eight (1878). From Crookston to St. Vincent, until January one (1), A. D. one thousand eight hundred and eighty (1880). From Alexandria to Fergus Falls, until January one (1), A. D. one thousand eight hundred and eighty (1880). From Fergus Falls to Glyndon, until January one (1), A. D. one thousand eight hundred and eighty-one (1881). Provided, however, that such extensions of time are made subject to all the provisions of this and of the succeeding sections of this act.'"

Sections 2 and 3 amend section 7 of the original act; section 4 strikes out certain provisions of section 9 of the former act; and section 6 (there is no section 5) provides that the act shall take effect and be in force from and after its passage. Section 10 of the act of 1877 is in no manner referred to in this act of 1878.

The defendant claims that the effect of these changes was to re-enact the whole act of 1877, so that the claims of all persons that had settled on any of the lands within the granted or indemnity limits after the passage of the act of 1877, and before the passage of the act of 1878, were saved and secured to them by section 10, precisely as if their settlement had been made on or prior to March 1, 1877, the time when the original act was approved.

An amendment of a statute "so as to read as follows" takes the

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place of the original, and operates to repeal all of it which is not embraced in the amendment. But the provisions of the original which are merely copied and retained in the new section without change are not repealed and re-enacted, but continue to be the law as before, while the changed portions are to be treated as having been the law only from the date of the amendatory act.

"This form of amending statutes is frequently used, and was adopted as a convenient mode of preserving a harmonious text, by incorporating the amendments into the original law, and presenting both together. Except in this respect, an amendment made in this way has no greater effect than if made in the form of an independent statute." Kerlinger v. Barnes, 14 Minn. 398, 401 (526). Sutherland, St. Const. § 133.

Now, a comparison of the provisions which we have quoted of section 6 before amendment and after shows that the only change or extension of time in which to build the line made by the amendment was that the time for completing that part of the line between Melrose and Sauk Center was extended one month; that is, from July 1, 1878, to August 1, 1878; while the time for completing the line from Sauk Center to Alexandria was reduced one month,—that is, from January 1, 1879, to December 1, 1878. All the rest of the amendment is simply a literal copy of the original. It declares no new cases of forfeiture, and the proviso making the extension of time "subject to all the provisions of this and of the succeeding sections of this act" must be treated as having been the law from the date of the passage of the original act, and cannot be construed as amending section 10 so as to declare a forfeiture of all lands settled upon by any person on or prior to date of the amendment, March 9, 1878. This would have been perfectly clear if the amendments had been by an independent statute, simply providing that the time for the completion of one specified part of the line should be extended one month, and reduced one month as to another specified part; but, as already suggested, the form of the amendment actually adopted cannot be given any greater effect as to the question we are considering than if it had been by an independent statute. The amendment to section 6 did not change the date of the passage of the act of 1877, which is the time fixed in section 10 at or before which the rights of settlers must have accrued in order to come within its provisions. If this latter section had been amended and re-enacted with section 6,

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we might have a very different question; but such is not the case, and we cannot by construction do that which the legislature has not done, and re-enact section 10, making the date of its passage March 9, 1878, instead of the actual date March 1, 1877. It is clear, both from what the legislature did do and what it failed to do, by the act of 1878, that it had no intention of forfeiting any more of the land grant than had been done by the act of 1877, for the railroad company was not then in default as to the construction of any portion of the line, and presumably there were no bona fide settlers to be protected except those already provided for by section 10 of the original act. The manifest purpose of the amendment to section 6 was simply to extend the time for the completion of one part of the line for one month, and correspondingly reduce the time as to another part.

Assuming, then, without so deciding, that all the facts found by the trial court as to the settlement of the defendant on the land in question are sustained by the evidence, it follows that its conclusion of law that he is the equitable owner of the land cannot be sustained, for he has failed to bring his case within the provisions of Sp. Laws 1877, c. 201, § 10, by showing that he or some party through whom he claims settled on the land on or prior to March 1, 1877.

The judgment must be modified so as to adjudge that the plaintiff is the owner and entitled to the possession of the whole of the premises described in the complaint in this action. So ordered.

JAMES MATTHEWS v. HERSHEY LUMBER COMPANY.[1]

July 3, 1896.

Nos. 9884—(144).

Evidence of Fraud—Foundation—Impeachment of Witness.

The correctness of certain tally cards, which were the basis of the scale bills received in evidence, was in issue in this case, and for the purpose of impeaching the integrity of the tallyman who made the cards and their correctness the defendant offered to prove subsequent particular acts of misconduct on the part of the tallyman occurring two years after the cards were made, from which it was claimed that an admission that the cards were fraudulent

[1] Reported in 67 N. W. 1008.

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might be implied. *Held*, that such evidence was not admissible without first laying the foundation therefor by proof sufficient in the opinion of the trial court to establish the fact that the tallyman was acting for or in collusion with the plaintiff as to such alleged acts.

Evidence—Rulings Sustained.

Certain rulings of the trial court as to the admission and rejection of evidence considered and *held* to be correct.

Appeal by defendant from a judgment of the district court for Ramsey county in favor of plaintiff for $2,066.98, after a trial before Brill, J., and a jury. Affirmed.

J. N. Searles, for appellant.

H. H. Gillen and *J. N. Castle*, for respondent.

START, C. J. This action was brought to recover the balance of the purchase price of certain logs which the plaintiff claimed to have sold and delivered to the defendant.

The complaint alleges that on May 1, 1892, the parties hereto entered into a contract whereby the plaintiff agreed to sell and the defendant to buy a quantity of saw logs of different marks, owned by the plaintiff, and then in St. Croix river above the St. Croix boom, and to be delivered therein, for which the defendant agreed to pay the plaintiff a stated price per thousand feet at the end of each month in which any of such logs were delivered; that during the season of 1892 he so delivered to the defendant logs which, at the contract price, aggregated in value $2,033.97, no part of which has been paid except $625.96. The answer admitted the contract, but put in issue the plaintiff's ownership of the logs, and alleged that the scale bills of the logs bearing plaintiff's marks presented to the defendant by the plaintiff as evidence of the quantity of logs delivered by him to it within the boom were fraudulent by reason of the fact that one of the tallymen, Charles T. Goodrich, acting in collusion with the plaintiff, made false entries on the scale cards, which were the basis of the scale bills and records in the office of the surveyor general of logs, whereby the plaintiff was credited with logs belonging to other parties. The answer also alleged that the defendant had paid the plaintiff for more logs than he had delivered to it.

On the trial one of the principal questions was the correctness of the scale cards made by Goodrich. The jury specially found that the

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tally of the plaintiffs' logs made by Goodrich upon the scale cards was not fraudulent, and returned a general verdict for the plaintiff for the full amount claimed. The defendant appealed from the judgment entered on the verdict. The defendant's assignments of error relate exclusively to the rulings of the trial court in admitting or rejecting evidence.

The plaintiff, to establish a delivery of the logs, introduced the scale bills, or certified copies of the surveyor general's records showing the quantity of logs scaled during the season of 1892, of the various marks sold by plaintiff to defendant and other parties, which showed on their face a delivery to the defendant of logs to the amount as stated in the complaint. He also offered evidence tending to show when and where he obtained the logs which he claimed to have delivered to the defendants and the other parties, and that the logs were driven clean from their respective landings during the season of 1892, and that logs bearing some of plaintiffs' marks were subsequently cut in the years 1893 and 1894. The defendant offered to show by a certified copy of the records of the surveyor general's office (Exhibit 5) that something like a hundred thousand feet of logs of the plaintiff's mark came out of the boom in the seasons of 1893 and 1894, as a basis for claiming that logs in quantities claimed by the plaintiff were not driven down and scaled in the season of 1892, even if he had them on the landings. The ruling of the court excluding Exhibit 5 is the first error relied on by the defendant. The ruling was correct, for the total of all logs of the plaintiff's marks, which came through the boom in 1892, 1893 and 1894, was less than the total of the logs which the plaintiff had cut and driven according to his testimony; hence the fact that logs came through the boom in 1893 and 1894 had no tendency to show that the logs which it was claimed came through in 1892 and were scaled did not come down. The evidence had no reasonable tendency to support defendants' claim or to contradict the plaintiff's evidence.

It does not appear from the record that the trial court erred in overruling the defendant's objections to the questions put to the witnesses Campbell and De Staffany and referred to in defendant's assignments of error Nos. 2 and 3.

The defendant called as a witness F. B. Yates who testified that in the year 1894, two years after the scale cards here in question were

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made, he was subpœnaed to produce in court certain scale cards made by a tallyman, Charles T. Goodrich, the same party who made the scale cards in question in this case, and give evidence in reference to them in an action entitled Crick v. Turnbull, then pending in the district court of the county of Hennepin. He further stated that he had an interview with Goodrich after he was so subpœnaed and was then asked this question: "What further transpired between you and Mr. Goodrich on the evening when he came into the office there at the time you expected to go to Minneapolis?" The trial court sustained plaintiff's objections to this question and such ruling is urged by the defendant as error. What the witness would have testified to if he had answered the question does not appear from the record, as no offer was made to show any particular acts or words of Goodrich at this interview, but defendant's counsel did state that he wanted to show that Goodrich and the plaintiff were co-operating to defeat justice by attempting to induce the witness Yates not to appear as a witness in the case referred to and produce the scale cards. Assuming, without so deciding, that this statement was a compliance with the rule that an offer of evidence must be sufficiently full to enable the court to see the materiality of it, we are of the opinion that the ruling of the trial court was correct. The tallyman, Goodrich, was not the agent of the plaintiff in making the scale cards as claimed by defendant, but he was an officer of the law, and his subsequent acts or declarations were not admissible as evidence, unless authorized by the plaintiff. Therefore the integrity of Goodrich's conduct in making the scale cards in question or their correctness could not be impeached in this case by showing subsequent particular acts of misconduct on his part, from which defendant claimed an admission that the cards were fraudulent might be inferred, without first laying the foundation by proof sufficient in the opinion of the trial judge to establish the fact that he was acting for or in collusion with the plaintiff as to such alleged misconduct. 1 Greenl. Ev. § 111. Whether a sufficient foundation was laid by the defendant by such proof was under the evidence in this case a question for the trial court.

In rebuttal the plaintiff called Goodrich as a witness, who testified in substance that he made a correct tally on the scale cards in question

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of the logs as called off to him by the scaler. On cross-examination the witness further testified as follows:

"Q. You say that you have not untruly put down logs and the contents of the logs on tally cards during your service as an employé of the surveyor general of Stillwater? A. I do. Q. That you never tampered with any cards? A. No, sir. Q. I will ask you if you did not take some cards that had been made by another tallyman in the mill boom of the St. Croix Lumber Company, and after those cards had been returned to the office if you didn't add a large quantity of marks, including some of the marks in controversy here, and a large number of figures indicating logs, and after thus padding those tally cards you footed them up, and your footings were carried into the scale cards issued on that work; isn't that so? A. I don't hardly know what you mean. Q. Didn't you pad the tally cards of another tallyman that showed logs that had been scaled by other parties in the mill boom of the St. Croix Lumber Company? A. I never saw them. I never had anything to do with them. I worked in the office a little while. Q. Wasn't you sent to work footing up? A. Yes, I footed up. Q. The logs and the contents of logs that had been tallied by another man in the St. Croix Lumber Company's boom, and didn't you before you finished that card, pad that card by adding there a large number of marks, including these marks in controversy? A. No, sir; I did not."

The defendant subsequently during the cross-examination of the witness asked him this question: "Do you remember of being in the surveyor general's office to take the place of a clerk for a few days and being assigned to the duty of footing up tally cards made by another tallyman of logs scaled in the boom of the St. Croix Lumber Company?" The time referred to was 1890 and defendant's counsel admitted that these cards did not refer to any logs in controversy in this case. But he further stated in substance that the purpose of the question was to show that the witness was assigned to the duty of footing up tally cards of another tallyman in the St. Croix Lumber Company's pond and took advantage of the opportunity to pad the cards with additions of his own representing some of the marks used on the logs here in controversy which were then owned by parties other than the plaintiff, by means of which the false additions were carried into the scale bills made up therefrom. And if the witness denied it he intended to prove it by other witnesses. The court sustained the plaintiff's objection to the question. Conceding that the alleged transaction was not too remote and the question proper on cross-examination for the purpose of testing the accuracy or integrity

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of the work of the witness as a tallyman, still he had already unequivocally answered the question and the ruling of the court was correct.

The witness was further asked if he remembered an interview with the witness Yates. This was objected to, and counsel for the defendant stated that he expected to show by the witness that he offered Yates a money consideration to give his testimony in the case in which he had been subpœnaed in a way which would be prejudicial to justice, and to influence his testimony in that case with reference to tally cards in connection with the marks in that suit made by the witness Goodrich. A witness cannot be impeached by showing particular acts of corruption or dishonesty and how far he may be interrogated on cross-examination as to matters immaterial to the issues on trial for the purpose of affecting his credibility is largely in the discretion of the trial court. Gardner v. Kellogg, 23 Minn. 463. We cannot say that the discretion of the trial court was not fairly exercised in sustaining the objection to this question.

The defendant's other assignments of error were not urged in its brief.

Judgment affirmed.

WARREN POTTER and Another v. E. G. HOLMES and Another.[1]

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s72	154
72	157
s74	509
74	513

July 3, 1896.

Nos. 9943—(204).

Contract for Sale — Payment after Inspection and Acceptance—Action for Price.

A contract by the parties hereto for the sale of railroad ties construed, and *held*, that payment therefor was to be made thirty days after the ties had been inspected, and accepted as complying with the contract, by a third party. *Held*, further, that the complaint in this action, which is for the recovery of the purchase price of the ties, failing to allege either such inspection and acceptance, or facts which would relieve the plaintiffs from the necessity of making and proving such allegation, it does not state a cause of action.

Appeal by defendants from an order of the district court for Aitkin county, Holland, J., denying a motion for a new trial, after a verdict in favor of plaintiffs for $11,370.47. Reversed.

[1] Reported in 68 N. W. 63.

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Warner, Richardson & Lawrence, for appellants.
Choate & Merrill and *McClenahan & Manior*, for respondents.

START, C. J. This is an action upon a written contract, dated September 15, 1893, between the parties hereto for the sale and purchase of railroad ties, to recover the contract price thereof. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and they answered. The trial resulted in a verdict for the plaintiffs for the amount claimed by them, and the defendants appealed from an order denying their motion for a new trial.

The only question which we find it necessary to discuss or decide is the proper construction to be given to the contract of the parties as to the time and manner of payment for the ties. This question was raised by the demurrer and on the trial by exceptions to various rulings of the court.

The contract was made a part of the complaint, and was set out in full by annexing a copy thereto. The defendants were the party of the first part and the plaintiffs the party of the second part in the contract, and the party of the first part thereby agreed to purchase and receive, and the party of the second part agreed to sell and deliver to them upon the terms and conditions therein specified, railroad ties of the quality and quantity therein stated. The contract then specified the quantity, kind, size, quality, and price of the ties. The quantity was specified in these words: "All ties purchased and handled by the said second party until September 1st, 1894." These words were written into the contract, and the balance thereof was printed except dates, designation of the kind of timber the ties were to be, and the words "100 per cent.," written over the words "seventy-five (75)," which were marked out of the contract as printed. The other material portions of the contract are as follows:

"The said ties must be delivered at side tracks on the line of the Northern Pacific Railroad Company on or before the first day of September, 1894. * * * It is mutually agreed and understood between the parties hereto that, in case of any change in specifications by the Northern Pacific Railroad Company, immediate notice of such change shall be given said second party, and thereafter no ties conflicting therewith shall be furnished. The parties of the first part agree to pay for all said ties that have been inspected and accepted by the Northern Pacific Railroad Company, except in cases

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hereinafter specified, as follows: 100 per cent. thereof within 30 days after each inspection. And the said party of the second part, in consideration of the premises, hereby promises and agrees that until the ties to be delivered under this contract shall be inspected and accepted by the Northern Pacific Railroad Company the said party of the second part shall, and hereby does, assume all risk of loss or damage thereto from any cause whatsoever, including loss or damage occasioned by fire communicated by any engine or car of the Northern Pacific Railroad Company or its branches, or resulting in any manner from the negligence or misconduct of any of the servants or employés of the Northern Pacific Railroad Company. * * * And the said second party hereby agrees to handle over the said ties as they are being inspected, if required to do so by the inspector of the Northern Pacific Railroad Company."

The plaintiffs claim that the provision of the contract to the effect that the defendants were to pay for all ties inspected and accepted by the railroad company within 30 days after each inspection refers only to such ties as the railroad company should purchase of the defendants, and that all other ties were to be paid for upon delivery; and, further, that if there is any inconsistency in the terms of the contract the printed part must yield to the written portions. As a legal proposition, this is true, but there is no inconsistency between the written words of the contract specifying the quantity and kind of ties the defendants agreed to purchase and receive and its printed provisions as to the inspection of the ties and when they should be paid for. The plaintiffs' construction of these provisions for inspection and payment is not justified by the letter or spirit of the contract.

The several provisions of the contract must be read and construed together, and effect must be given to all of them if it can be done by any reasonable construction. The defendants, by the contract, agreed to purchase and receive "all ties purchased and handled by the said second party [the plaintiffs] until September 1, 1894," of the quality and upon the terms and conditions thereinafter specified. The contract then proceeds to specify the quality of the ties and the terms and conditions of the purchase. The written words used to designate the quantity of the ties to be purchased in no manner qualify these subsequent terms and conditions as to the quality, inspection, and payment of the ties. In this respect the contract stands precisely as it would if the quantity of the ties had been definitely stated therein at a given number. Having designated the quantity to be purchased, the

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parties proceed to define the kind and quality of the ties, and to fix the place of delivery and the time of payment, viz. within 30 days after their inspection and acceptance by a third party as complying in kind and quality with the contract. If there had been no terms and conditions in the contract as to when payment was to be made, the law would imply a promise to pay on delivery; but the parties have not left the matter to rest on any legal implication, for they have expressly provided when payment shall be made.

The contention of the defendants that the ties were not to be paid for unless and until the railroad company purchased the ties of them, is as untenable as that contended for by plaintiffs. It may reasonably be inferred from the provisions of the contract considered as a whole that the parties understood that the defendants intended to sell the ties they agreed to buy of the plaintiffs to the railroad company, hence it was agreed upon as an arbiter to inspect and accept the ties as complying with the contract, and payment was to be made within 30 days after each inspection. In this respect the railroad company occupied the same position as an architect or civil engineer who is agreed upon to inspect work and give a certificate that the work is in accordance with the contract before payment therefor is to be made. St. Paul & N. P. R. Co. v. Bradbury, 42 Minn. 222, 44 N. W. 1. That this is the proper construction of this contract is apparent not only from the special provisions to which we have referred, but also from the other portions of the contract which we have quoted. Thus it was a part of the contract that the plaintiffs should handle the ties as they were inspected, if required by the inspector of the railroad company; and, further, the plaintiffs assumed all risks of loss or damage of or to the ties until inspected and accepted by the railroad company. The contract on the part of the plaintiffs was not completed as soon as the ties were delivered at the side tracks of the railroad company, and the claim of the plaintiffs that the purchase price was then due can only be sustained by arbitrarily reading out of the contract by construction all the terms and conditions upon which the purchase was made.

Such being the contract, it was necessary for the complaint to allege either that the ties had been inspected and accepted 30 days before the commencement of the action, or facts which would relieve the plaintiffs from the necessity of making and proving such allegation.

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Johnson v. Howard, 20 Minn. 322 (370). It does neither, hence it does not state a cause of action.

Order denying the defendants' motion for a new trial must be reversed, and the case remanded, with direction to the district court to dismiss the action without prejudice, unless the plaintiffs can and are permitted to amend their complaint. So ordered.

CANTY, J. (dissenting). I cannot concur in the foregoing opinion except so far as it holds that the contract between the parties made the inspector of the Northern Pacific Railroad Company the arbiter between plaintiffs and defendants to decide what ties were up to the standard specified in the contract. In my opinion, the only effect of the provision that the defendants "agree to pay for all said ties that have been inspected and accepted by the" railway company "within 30 days after each inspection" is to prevent the debt from coming due until after the end of such 30 days. And, plaintiffs having failed to allege the occurrence of this condition precedent to the accruing of their cause of action, it must be presumed that the action is premature. But it takes clear language to make one man the binding arbitrator of another man's rights. It is true that by a very liberal construction an agreement to that effect may be spelled out of this contract, but such liberal construction cannot be allowed. It is also true that, according to my interpretation of the contract, it is left to implication when defendants shall pay plaintiffs for the ties which the railway company refuse to accept. But the law will imply that much more readily than it will imply that defendants bound themselves to accept the inspection of the railway company as binding on them, when there is nothing in the contract even to show that defendants were by their contract with the railway company themselves bound to abide by that inspection. Of course, this may be suspected from the contract before us, but suspicion is not enough. By the terms of plaintiffs' contract, their whole claim, in my opinion, came due as soon as the railway company inspected the ties, and accepted a part and rejected the balance; that they were not bound by its inspection, but might show that ties inspected by it, and placed in one grade, were in fact up to the standard of a higher grade, and that ties rejected by it were in fact up to the standard specified in the contract.

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MARY MORROW, Administratrix, v. ST. PAUL CITY RAILWAY COMPANY.[1]

July 3, 1896.

Nos. 9959—(224).

New Trial—Erroneous Reason for Granting.

Where the trial court assigns an insufficient reason in support of its order granting a new trial, the order will not be reversed if it appears from the record that prejudicial errors of law occurred on the trial, which were excepted to.

Master and Servant—Safe Place to Work—Submission of Question not in Issue.

Held, that the trial court erred in submitting to the jury in this case the question whether the defendant furnished the plaintiff's intestate (an employé of the defendant) a safe place in which to work, for the reason that such question was not one of the issues under the pleadings.

Appeal by plaintiff from an order of the district court for Ramsey county, Willis, J., granting a motion for a new trial. Affirmed.

C. D. & Thos. D. O'Brien, for appellant.

Munn, Boyesen & Thygeson, for respondent.

START, C. J. The plaintiff's intestate, George Morrow, was on March 22, 1895, a conductor in the employ of the defendant, on one of its electric car lines, known as the "Selby Avenue Extension," which connected with its cable line at Milton street, in the city of St. Paul. While he was engaged, on the day named, in transferring his car from one track to another on the electric line, a cable train collided with the electric car, whereby he received injuries from which he died two days thereafter. This action was brought by his administratrix to recover damages for his death, on the ground that it was caused by the negligence of the defendant. The specific and only acts of negligence on the part of the defendant charged in the complaint are that the gripman operating the cable train was incompetent and unable to manage the same, to the knowledge of the defendant; that the cable, machinery, and appliances furnished by the defendant to propel, control, and operate the cable train were

[1] Reported in 67 N. W. 1002.

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insufficient and defective. These allegations were put in issue by the answer. There was a verdict for the plaintiff in the sum of $3,500, and the defendant moved the court for a new trial, on the ground, among others, that the verdict was not justified by the evidence, and for errors of law occurring on the trial, and excepted to by the defendant. The motion was granted in general terms, without specifying the particular grounds therefor; but, in his memorandum attached to the order granting the motion, the trial judge stated that the defendant was entitled to a new trial, by reason of error on the trial in permitting the plaintiff to cross-examine the gripman of the cable train, who was called as a witness by the defendant, as to his competency.

If this alleged error was the only one in the case, we should find difficulty in affirming the order, for the cross-examination of the gripman did not exceed the reasonable limits which the trial court, in its discretion, had a right to permit. But the reason assigned in the memorandum for making the order is no part of the order, and it will not be reversed if other prejudicial errors of law occurred on the trial, and were excepted to by the defendant.

The court instructed the jury to the effect that the defendant was bound to use due care and caution to provide a safe place for its servants in which to perform the duties assigned to them, and that for any violation of this rule the defendant was liable for damages. The exception to this instruction, and the response of the court thereto, are in these words:

"Mr. Thygeson: I would like at this time to take an exception to that part of the court's remarks, just made, that the defendant is liable in this case because of failure to furnish a safe place in which the servant should be employed, on the ground that there is no such issue in this case. The Court: Well, it is for the jury to say, under all the circumstances, whether the regulation that a man shall get down on the ground, and stand back of his car, at the time when he puts the trolley on, was a regulation or instruction which furnished him a safe place or not, in view of the close proximity of the switch to the other track, and all the surrounding circumstances in the case."

It is to be noted that the attention of the court was by the exception specifically called to the fact that there was no issue in the case as to whether the place assigned to the deceased in which to work was unsafe or not. If it was so in fact, by reason of the conditions sug-

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gested by the court to the jury, they may have been obvious to the deceased, and he assumed the risks. We have already stated the only acts of negligence on the part of the defendant charged in the complaint, and the charge that the defendant was negligent in not furnishing a safe place for the deceased in which to perform his work was neither alleged nor litigated, by consent or otherwise. The giving of this instruction under these circumstances, when the defendant had no opportunity to meet the charge, was clearly prejudicial error, for which the defendant was entitled, as a matter of right, to a new trial.

Order affirmed.

A. M. HAYNES v. BOARD OF COUNTY COMMISSIONERS OF BLUE EARTH COUNTY.[1]

July 3, 1896.

Nos. 9966—(233).

County Surveyor—Voluntary Service—Implied Request—G. S. 1894, § 831.

G. S. 1894, § 831, which provides that the county surveyor shall execute all surveys which shall be ordered by any court, board of county commissioners, or town supervisors, construed, and *held* that it does not authorize a county surveyor, whenever a county or a town let a contract for public improvements, the plans of which, in his opinion, necessitate the service of a surveyor or civil engineer, to do the work at the expense of the county or town, on his own motion, and without any request, express or implied, from the proper public authorities. Such request cannot be implied from the mere fact that they adopt plans and let the contract for the improvement.

Appeal by defendant from an order of the municipal court of Mankato, Shissler, J., denying a motion for a new trial. Reversed.

C. L. Benedict, for appellant.

W. R. Geddes, for respondent.

START, C. J. The plaintiff is the county surveyor of the defendant county, and brought this action to recover from the defendant compensation for alleged official services. The material part of his complaint is, in substance, in these words: That between the

[1] Reported in 67 N. W. 1005.

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first day of January and the fourteenth day of August, 1895, the plaintiff did and performed eleven days' service for the defendant in his official capacity as county surveyor, which services he was by law in duty bound to perform, aggregating the sum of $44. The answer admits that the plaintiff was and is county surveyor, puts in issue allegations of the complaint we have referred to, and alleges that if the plaintiff performed the alleged eleven days' service he did so of his own motion, without any authority from the defendant. The trial court made its findings of fact and conclusions of law, and ordered judgment for the plaintiff for the amount of the alleged services. The defendant appeals from an order denying its motion for a new trial.

It is not claimed by the plaintiff that any part of the services for which he seeks to charge the defendant was rendered in the execution of any survey expressly ordered by the board of county commissioners. It appears from the undisputed evidence that the defendant had adopted plans and specifications for certain public improvements, and let contracts for the work. These contracts related to the building of culverts and bridges and otherwise improving the county roads. The plaintiff thereupon, on his own motion, and without any request or authority of the defendant board except such as the law will imply, if any, from the fact that it adopted the plans and let the contracts, proceeded to do certain work as a surveyor and civil engineer with reference to such improvements and the execution of the contracts thereupon, which, in his judgment, was necessary to be done. It is for these services so rendered that he seeks to recover in this action.

The claim of the plaintiff is that, whenever the county lets a contract for the making of any public improvements, the plans and specifications of which necessitate the employment of the skill of a surveyor or engineer, it is the duty and the right of the county surveyor to do such work without further request or authority; and, further, that the board of county commissioners cannot employ any other surveyor or civil engineer to do the work. The trial court accepted this view of the statute, and made the following finding as to the plaintiff's services here in question:

"That he did, as such county surveyor, do and perform the services in his complaint alleged, and the services were all done and per-

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formed upon improvements commenced and carried on by the board of county commissioners in the regular way by resolution of the county board, requiring the skill and the tools and implements of a surveyor and engineer, and that said board did give and order one J. R. Thompson to do and perform said work, he not being an elected, qualified, and bonded officer of the county to do and perform such services, while it is the right of and the duty of the duly elected, qualified, and bonded officer of the county to do and perform such services; and all the work by him done was necessary to the proper prosecution and completion of said improvements, and required the skill of a surveyor or civil engineer, and the use of tools and instruments employed in like professions."

It is upon this finding that the conclusion and order of the court for judgment for the plaintiff rests. If the contention of the plaintiff is justified by the statute, the ruling of the trial court was correct, and the order denying a new trial must be affirmed; otherwise it must be reversed.

The statute (G. S. 1894, § 831) provides that the county surveyor, by himself or one of his deputies, shall execute all surveys which shall be ordered by any court, board of county commissioners, town supervisors, or other public officers within his county, or upon the application of any individual or corporation. The next section of the statute (section 832) provides that he shall keep a correct record of all surveys made by him, and preserve a copy of the field notes; and section 833 prescribes the rules for making all surveys.

If these sections are read together, there is no room for doubt as to what surveys the county surveyer is required to execute when ordered by the court or by the town or county officers. They are such surveys as he is required to make a record of; for example, surveys of lands and roads. If the town supervisors or board of county commissioners decide to lay out or change a highway, and order a survey thereof, it would be the duty of the county surveyor under the statute to proceed and make the survey, without any further authority or direction; but the statute has no reference to the work of a civil engineer, and never was intended to authorize the county surveyor, whenever the town supervisors or county commissioners of his county let a contract for the building or repairing of a town hall, courthouse, bridge, road, or ditch, and he was of the opinion that the services of an architect or civil engineer were necessary or required by the plans adopted for the execution of the work, to render such

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services of his own motion, and without any request, express or implied, so to do. The county surveyor is simply the surveyor of the county in the popular sense of the word; not its civil engineer. This is manifest from his duties as defined by statute. If a town or county have occasion for the services of a civil engineer it might be a proper and gracious act for them to employ the county surveyor, if competent; but he cannot force his services, in such cases, upon them, without their request or consent.

It follows from this construction of the statute that the plaintiff is not entitled to recover for the services in question without showing that they were rendered at the request, express or implied, of the defendant, and that the mere fact that defendant had let contracts for the public improvements as to which the services were rendered is not sufficient to establish such request. As there must be a new trial, we do not express any opinion as to whether the evidence shows such request as to plaintiff's services in giving the grade of the courthouse square.

Order reversed, and a new trial granted.

GUST LUNDQUIST v. DULUTH STREET RAILWAY COMPANY.[1]

July 3, 1896.

Nos. 9971—(206).

Street Railway—Injury to Employé—Negligence of Fellow Servant.

The defendant, a street-railway company, required by its rules that its employés in charge of its cars should give timely warning by proper signals to its employés engaged in track repairing, of the approach of its cars. The plaintiff in reliance on such rules, and while at work repairing the track of the defendant, as its employé, was struck and injured by a car, by the failure of the motorman to give such signals, and by his running the car at a rate of speed prohibited by law. *Held*, that the plaintiff and the motorman were fellow servants, and that the defendant is not liable to the plaintiff for his injuries resulting from the negligence of the motorman.

[1] Reported in 67 N. W. 1006.

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Appeal by plaintiff from an order of the district court for St. Louis county, Morris, J., denying a motion for a new trial. Affirmed.

Jno. Jenswold, Jr., for appellant.

Billson, Congdon & Dickinson, for respondent.

START, C. J. The defendant is a street-railway corporation, and operates a double-track street-railway line upon Superior street, in the city of Duluth. On July 10, 1894, the plaintiff, while at work as the servant of the defendant repairing its tracks on that street, was struck and injured by one of its cars which was then being operated along its tracks. He brought this action to recover damages for such injury, alleging in his complaint that it was due to the defendant's negligence. At the trial, the defendant, upon the pleadings and certain admissions made by the plaintiff, moved the court to dismiss the case, on the ground that the negligence of which plaintiff complained was that of the motorman, his fellow servant. The motion was granted, and plaintiff appealed from an order denying his motion for a new trial.

The short facts of the case, as disclosed by the complaint and the admissions at the trial, are these: The plaintiff was one of a crew of men employed by the defendant, who were engaged in repairing the tracks, by taking up and relaying the pavement between the rails over which the defendant's street cars operated by electric power passed frequently at irregular intervals. In order to make the place a reasonably safe one for the men thus employed, the defendant adopted a rule whereby it required those in charge of its cars to give timely warning of their approach to the crew, and it was the custom to so do. The plaintiff pursued his work in reliance upon this rule and custom and a due observance of them by the defendant, and while he was so engaged, and without notice of the approach of the car which struck him, this car approached, at the rate of ten miles an hour, the place where the plaintiff was at work, and the motorman in charge thereof failed to make any effort to slacken its speed, and negligently failed to give any signal or warning of its approach. The charter of the defendant provides that no car shall be run within the limits of the city at a greater rate of speed than six miles an hour. The principal question presented by these facts for

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our decision is whether the negligence of the motorman was that of a fellow servant or a vice principal.

The provisions of Laws 1887, c. 13,[2] modifying the law as to injuries sustained by one servant by the negligence of his fellow servant in cases of railway companies, have no application to the defendant street-railway company. Funk v. St. Paul City Ry. Co., 61 Minn. 435, 63 N. W. 1099.

Counsel for the plaintiff claims that it was the defendant's duty to furnish to plaintiff a reasonably safe place in which to work, and, as a means of making the place in question safe, it was necessary to give him due warning of the approach of its cars, and, defendant having made a rule requiring the motorman to give such warning, his failure to do so was the negligence of the defendant, and not of a fellow servant. He supports his contention with ability and the citation of adjudged cases in other jurisdictions; but, whatever may be the rule elsewhere, we must hold that the negligence of the motorman was that of a fellow servant, as we regard the question settled by the previous decisions of this court.

It is true, as claimed, that it was the duty of the defendant to use reasonable care to provide a safe place in which the plaintiff was required to work, and that this duty, like the duty to furnish safe machinery and proper appliances for doing the work, was an absolute one, which the defendant could not delegate, so as to be relieved from liability in case the duty was neglected. But if the safe place or safe machinery which the master has furnished and keeps in repair is made unsafe by the negligence of his servants, whom he has selected with due care, in using or operating the place or machinery, and one of his servants is injured thereby, such negligence is that of a fellow servant. Foster v. Minnesota C. Ry. Co., 14 Minn. 277 (360); Collins v. St. Paul & S. C. R. Co., 30 Minn. 31, 14 N. W. 60; Connelly v. Minneapolis Eastern Ry. Co., 38 Minn. 80, 35 N. W. 582; Randall v. Baltimore & O. R. Co., 109 U. S. 478, 3 Sup. Ct. 322.

The plaintiff relies in support of his proposition upon the following cases in this court: Erickson v. St. Paul & D. R. Co., 41 Minn. 500, 43 N. W. 332; Anderson v. Northern Mill Co., 42 Minn. 424, 44 N. W. 315; Westaway v. Chicago, St. P., M. & O. Ry. Co., 56 Minn.

[2] G. S. 1894, § 2701.

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28, 57 N. W. 222; Schulz v. Chicago, M. & St. P. Ry. Co., 57 Minn. 271, 59 N. W. 192. These cases are not in point. In the first one the law of fellow servants was not involved, for the plaintiff in that case was not a servant of the railway company, but of an independent contractor. The remark quoted in his brief by counsel, from the opinion and syllabus of the case cited, to the effect that the duty of the defendant to plaintiff in respect to giving proper signals of the approach of trains was the same whether the plaintiff was in its employment or that of its contractor, means only that the railway company owed the same obligation to exercise care for the safety of an employé of a contractor working on or near its tracks as it would if he was its own employé. It is to be remembered that the case arose and the opinion was written after Laws 1887, c. 13 (defining the liabilities of railroad companies for injuries to their servants by the negligence of fellow servants) was enacted. In the second case cited, the negligence of the employé of one person resulted in the injury of an employé of another. No question of fellow servant was involved. The third case related to the duty of a railroad company to a traveler to give its usual signals of the approach of its trains at a private wagon crossing. The last case cited arose after Laws 1887, c. 13, became a law. The plaintiff and the motorman in the case at bar were fellow servants. Neal v. Northern Pac. R. Co., 57 Minn. 365, 59 N. W. 312.

The plaintiff was injured by the negligence of the motorman in failing to give any signal of the approach of the car, or to slacken its speed, as it was his duty to do. But such duties did not appertain to the work of furnishing, constructing, or equipping a safe place for work, or safe machinery for the execution of the work, but to the operation of the street railway; hence his negligence in the premises was that of a fellow servant, and the plaintiff cannot recover.

The plaintiff further claims that the fact that the car which struck him was being run at the time at a rate of speed exceeding six miles an hour, in violation of law, renders the defendant's liability for his injuries absolute. Statutes and ordinances regulating the speed of railway trains, providing for the giving of signals at crossings, and for fencing the right of way, do not abrogate the qualifying principles of the common law relating to contributory negligence, assumption of risks, and injuries by the negligence of fellow servants. Randall

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v. Baltimore & O. R. Co., supra; Fleming v. St. Paul & D. R. Co., 27 Minn. 111, 6 N. W. 448; Johnson v. Chicago, M. & St. P. Ry. Co., 29 Minn. 425, 13 N. W. 673; Moser v. St. Paul & D. R. Co., 42 Minn. 480, 44 N. W. 530. The fact that one of the acts of negligence of the motorman complained of in this case was prohibited by law does not affect the question of the liability of the defendant to the plaintiff for injuries resulting solely from the negligence of his fellow servant.

Order affirmed.

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J. ARTHUR HALL v. PETER P. SWENSEN.[1]

July 7, 1896.

Nos. 9878—(186).

Statute of Limitations — Action against Sheriff for Money Received on Redemption.

G. S. 1894, § 5137, limiting the time in which certain actions may be brought, reads as follows: "Within three years * * * an action against a sheriff, coroner or constable upon a liability by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution." *Held*, that the mere failure of a sheriff, receiving money on a redemption of real estate made through him, to pay the same to the party entitled thereto before any demand is made upon him for it, is not the omission of an official duty, within the meaning of such statute, and in such case an action against the sheriff for the recovery of the money is not barred in three years from the time he received it.

Appeal by plaintiff from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial. Reversed.

Ed. T. Teitsworth, for appellant.

Peterson & Kolliner, for respondent.

BUCK, J. For the purposes of this trial, and in order to relieve the parties from the necessity of calling witnesses, they stipulated as to certain facts, and the finding of the court below reads as follows:

"First. From January 1, 1891, to January 1, 1893, said defendant was the duly elected and qualified sheriff of said Hennepin county.

[1] Reported in 67 N. W. 1024.

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Second. On the 8th day of October, 1891, the above-named plaintiff was the owner of a sheriff's certificate of mortgage foreclosure covering, and in which certificate was described, lot 4 and north half of lot 5, block 11, Bloomington Avenue addition to Minneapolis, situated in said county, made pursuant to a mortgage foreclosure sale of said premises, which sale was made by the sheriff of said county on October 13, 1890. There was due on the 8th day of October, 1891, on said sheriff's certificate, the sum of $469.11. Third. On said 8th day of October, 1891, one Andrew F. Hilyer, the owner of the fee of said premises, made redemption thereof from said mortgage foreclosure sale, and paid the said defendant, the sheriff of said county, in redemption thereof, the sum of $469.11, and the certificate of redemption made pursuant thereto and in accordance with the law was duly recorded in the office of the register of deeds of said Hennepin county on October 8, 1891. Fourth. Thereafter, and before the commencement of this action, plaintiff made demand upon defendant for said money paid to said sheriff in redemption of said premises from said foreclosure sale. Said defendant refused to pay the same to plaintiff, and no part of said sum has ever been paid to plaintiff. Fifth. This action was begun by serving summons and complaint upon defendant April 20, 1895."

Upon the facts the trial court found as conclusions of law as follows:

"(1) The said money was received and retained by said defendant in his official capacity, and in virtue of his office. (2) This action not having been commenced within three years from the time the money was paid defendant, the claim is waived. (3) Plaintiff is entitled to take nothing by this action, and defendant is entitled to judgment for his costs and disbursements herein."

The appeal is from an order denying plaintiff's motion for a new trial.

The defendant contends, and this contention was sustained by the trial court, that, this action not having been commenced within three years after the receipt of the money by the defendant, the action is barred by the first division of section 5137, G. S. 1894, which reads as follows:

"An action against a sheriff, coroner or constable upon a liability by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution."

In our opinion, the mere failure of a sheriff, receiving money on a redemption of real estate made through him, to pay the same to the party entitled thereto before any demand is made upon him for it,

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is not the omission of an official duty within the meaning of the statute, and in such case an action against the sheriff for the recovery of the money is not barred in three years from the time he received it. The manner in which the money came into the possession of the defendant as sheriff is authorized by G. S. 1894, § 6042, relating to the redemption of real property sold on foreclosure by advertisement, and that portion of the section bearing upon the subject is as follows:

"The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff who made the sale, or his successor in office, the amount required by law for such redemption."

In receiving this redemption money he acted as the custodian of the law, and not as the agent of either party. Horton v. Maffitt, 14 Minn. 216 (289); Davis v. Seymour, 16 Minn. 184 (210). It was received by the sheriff by virtue of his office. In re Grundysen, 53 Minn. 346, 55 N. W. 557. There is no affirmative duty imposed upon the sheriff by positive law to hunt up the mortgagor, and notify him that the redemption money is in his hands. The statute expressly provides [2] that the several papers necessary to be presented to the sheriff authorizing him to receive the redemption money shall, within 24 hours after redemption is made, be filed in the office of the register of deeds of the county in which the mortgaged lands are situated. It also provides [3] that the officer from whom such redemption is made shall make and deliver to the person redeeming a certificate under his hand and seal, containing the name of the person redeeming, the amount paid by him on such redemption, a description of the sale for which such redemption is made and the property redeemed, stating upon what claim such redemption is made, and, if upon a lien, the amount claimed to be due thereon at the date of redemption, which certificate shall be executed and proved or acknowledged and recorded as provided for conveyances of real estate. Thus ample facilities are afforded to the mortgagee for ascertaining whether the redemption has been made, the time when, by whom, and the amount paid. If he desires the redemption money, he should seek the officer holding it safely for him, and demand its payment or delivery over to

[2] G. S. 1894, § 6042.

[3] Section 6043.

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him. If the officer refuses so to do, then there would be "the omission of an official duty" provided by G. S. 1894, § 5137.

As to whether there might not be cases where the circumstances would be of such a nature that the sheriff would be put to some active duty in paying over the money before an actual demand was made, or whether the statute of limitations would not run in any event in six years from the receipt of the money, are questions not involved in a decision of this case, and as to them we express no opinion.

The facts in this case show no misappropriation of funds or the redemption money, nor any attempted, by the sheriff. It was conceded upon the argument that no demand was made until after the expiration of the three years from the time defendant received the redemption money, viz. October 8, 1891. Hence the three-years limitation does not apply to the action, and it was not barred before its commencement.

The order denying a motion for a new trial is reversed.

ELLEN T. WINDOM and Others v. ALMON C. BROWN and Others.[1]

July 7, 1896.

Nos. 9962—(193).

Lost Instrument—Sufficiency of Evidence.

Evidence *held* sufficient to establish the execution, loss, and contents of a certain written instrument.

Appeal by plaintiffs from a judgment of the district court for Hennepin county, entered in pursuance of the findings and order of Smith, J. Affirmed.

Morphy, Ewing, Gilbert & Ewing, for appellants.

Chas. G. Laybourn, Cross, Hicks, Carleton & Cross, and *Marshall A. Spooner*, for respondents.

[1] Reported in 67 N. W. 1028.

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BUCK, J. This is an appeal by the plaintiffs from a judgment of the district court of Hennepin county, entered in an action commenced by one of the plaintiffs as widow and the surviving children of William Windom, deceased, to quiet title to the N. W. ¼ of section 3, in township 118, range 22, in Hennepin county, Minnesota. The action in form is one to determine adverse claims. Almon C. Brown and wife were made principal defendants, and the other defendants, of whom there are a large number, are either judgment creditors of Brown, or persons who were supposed to hold liens upon the property in question, or on such interest as Brown had therein, by virtue of mortgages thereon executed by Brown and his wife. The only defendants who answered in the case were S. E. Neiler, to whom a mortgage was given by Brown upon his interest in the land for the benefit of the Union National Bank, of which Neiler was president, and Otto E. Naegele, who was a judgment creditor of Brown, claiming a lien upon Brown's undivided interest in the land.

During the pendency of the action, Lewis C. Spooner intervened therein, and claimed to be the equitable owner of an undivided one-sixth interest in the land; that, before the death of Windom, he made a contract with Almon C. Brown, but in fact with the firm of Spooner & Brown, composed of Lewis C. Spooner, Almon C. Brown, and one Rhone, which contract provided that whereas certain claims had been made against said lands by other parties on account of certain tax titles, if said Brown should, in behalf of Windom, institute and prosecute such litigation as might be necessary to remove from said lands the cloud of said tax titles, he (Brown) should have a conveyance of an undivided one-third interest in and to said lands; and that said contract, although in the name of Brown, was, in fact, understood by all parties, including Windom, to have been made with the firm of Spooner & Brown.

The trial court found as facts that a contract in writing did exist between Windom and Spooner & Brown, in the name of Brown, as set forth in the intervenor's complaint in the action; that Spooner & Brown had in all respects completely performed all the terms of said contract in and so far as they were concerned; that they had become fully entitled to a conveyance of an undivided one-third interest in the land; that such interest had in fact been divided between the members of the firm of Spooner & Brown, and should be divided between

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them so that Spooner and Brown should each have an undivided one-sixth interest therein; and the court ordered that judgment should be entered accordingly in their favor. But, by the same order, the court directed that judgment be entered establishing the interest and right of the Union National Bank, and of Otto E. Naegele, and made these claims liens upon the undivided one-sixth interest of Brown, but ordering and establishing the judgment held by Naegele as a paramount and superior lien on Brown's interest; the judgment having been entered and docketed prior to the accruing of any other liens. After the entry of the judgment according to the order of the trial court, the plaintiffs took this appeal.

We do not deem it necessary to enter into an analytical discussion of the evidence upon which the trial court based its finding of facts as to existence of the contract between Windom and Brown. That there was a contract, either oral or in writing, seems beyond any reasonable controversy; and that it was fully performed on the part of Brown or Brown & Spooner, by their successful litigation in favor of Windom, is quite conclusive; and nowhere does it appear that Windom ever actually paid for these legal services performed in his behalf. This fact gives force to the contention of the defendants that the payment for such services was to be made by Windom's conveying to Brown, or the firm of Brown & Spooner, an undivided one-third interest in the land described in the complaint. That such contract was in writing, as found by the trial court as a fact, seems to be supported by ample evidence, and we decline to disturb such finding. The only legal questions which we need discuss arose at the trial as to the sufficiency of the preliminary proof offered to show the loss of the written contract, and the admission of secondary evidence as to the contents of the contract.

The original written contract between Brown and Windom could not be found and produced as evidence on the trial. It appears that this contract was made in the latter part of the year 1885, or early part of the year 1886, and the business to which it related was successfully completed by Brown & Spooner before August 1, 1888. Windom died about February 1, 1891, and neither the contract nor a copy thereof could be found among his papers. Brown & Spooner were practicing attorneys, with their office located in Minneapolis; but Brown left there about November 1, 1889, and, during the succeeding

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few years, resided at several other different places. He appears to have been a man of a roving disposition, either insolvent or indifferent as to the payment of his debts, and careless in keeping his papers. Soon after leaving Minneapolis, many of his books and papers were shipped to him at Washington, D. C., where Mrs. Brown, wife of Almon C. Brown, testified that she saw this contract in question in his possession, in 1890, and there heard him read it. Brown's papers not shipped to him at Washington were turned over to Mr. Cahaley, of Minneapolis. Mrs. Brown also testifies that she saw the contract afterwards, in the hands of Edward A. Sumner, at his residence in New York City, who had it among other papers which he had taken from the hotel at Waterbury, Connecticut, where Brown had left his grip as security for his board bill, as Mr. Sumner had paid the bill, and taken the papers, and held them also for money loaned Brown. Sumner was a practicing lawyer in New York City, and formerly knew Brown in Minneapolis, and befriended Mrs. Brown while she had a sick child and was without funds. He testifies that, to the best of his recollection, he never had the contract in his possession, and he could not tell where it was, and that Mrs. Brown took from the papers in the grip such ones as she wished. Mrs. Brown was unable to find the contract or tell where it was. Cahaley, with whom part of Brown's papers were left, testified that he had made diligent search for the contract among his papers, and those left with him by Brown, and could not find it. About February 9, 1893, Brown left the city of New York, and went to the city of Duluth, in this state, from which place he wrote his wife, stating that he was going out from under the jurisdiction of the old flag, and very likely would never return again, since which time she has not heard from him, and his whereabouts are unknown to her or parties connected with this action.

It seems to us that the defendants used all diligence and reasonable exertions to find this contract. The law does not require impossibilities. The parties in whose possession it was last seen could not find it. For its loss the defendants were in no way accountable. Brown himself was undoubtedly beyond the jurisdiction of the court, and his whereabouts entirely unknown to the defendants or to any one else, so far as appears by the evidence. There was no suspicion that it had been purposely destroyed, and its nonproduction was accounted for by reason of the defendants' inability to find it. The

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search for it seems to have been made in good faith, and to the extent which the nature of the case admitted. When the making of the contract was duly proved, and its loss established by competent evidence, then, as a matter of legal right, the defendants were entitled to prove its contents by parol testimony.

The sufficiency of the evidence to establish the contents of the contract as alleged by the defendants is assailed by the plaintiffs. It is doubtless the rule that, when a written contract is lost or destroyed, its contents can only be established by parol evidence that is reasonably clear and certain. The instrument itself is the highest grade of evidence of its contents, and, in case of loss or destruction, only the highest grade of secondary evidence obtainable will answer the requirements of the law. This is the only safe rule, but an exact literal proof of its contents is not absolutely necessary. Evidence showing the substantial formalities required by law necessary to have made the lost instrument effective is required, especially where it affects the title or right in or to real estate.

F. E. Goddard, a witness sworn in behalf of intervenor, testified as follows:

"Q. Now, do you know how that business or litigation was undertaken by the firm of Spooner & Brown, whether it was under a written agreement or otherwise? A. It was undertaken through a contract with Mr. Windom. Q. Was that contract oral or in writing? A. Writing. Q. Have you seen that contract? A. Yes, sir. Q. When did you see that contract? A. I saw it in the year 1886. Q. Were you at that time acquainted with the signature of William Windom? A. Yes, sir. Q. Do you know whether his signature was appended to that contract? A. Yes, sir; it was. Q. Do you know whether or not that contract related to the land involved in this action, which is the northwest quarter of section three, township one hundred and eighteen, range twenty-two, in Hennepin county, Minnesota? A. It was. Q. What were the terms of that contract? A. The terms of the contract were that Mr. Brown was to go on and commence suit, and clear the title of its defects, in Mr. Windom's name, and he was to have one-third interest in it. Mr. Spooner: Was to have one-third interest in the land, and, if he succeeded in clearing the title, what was Mr. Windom to do, if anything? A. He was to convey one-third interest to Mr. Brown for his services. Q. That contract was made in A. C. Brown's name? A. Yes, sir. Q. Do you know whether or not the expense of that litigation was paid by the firm of Spooner & Brown, or by Mr. A. C. Brown? (Objected to, as not the best evidence.) The Court: Answer it 'Yes' or 'No.'

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A. The expenses were all paid by Mr. Brown. Mr. Spooner: Answer it 'Yes' or 'No,'—whether you know or not. You do know? A. Yes. Q. Were they paid? A. Yes, sir; they were paid."

Cross-examination:

"Q. You saw a contract, you say, in 1886, in which Mr. Brown was to take certain proceedings to clear the title of certain lands? A. Yes, sir. Q. Where did you see that contract? A. I saw it in Mr. Brown's office. Q. At what time in 1886? A. Well, I presume about the middle of the season, in June. Q. June, 1886? A. Or earlier than that; I could not state just what time; some time during that spring. Q. Did you see more than one contract between Windom and Brown? A. Mr. Brown, I think, had two or three contracts with him. Q. Did you read them all over carefully? A. I have had Mr. Brown read them to me. He talked considerably to me about the matter at that time. Q. You heard Mr. Brown read them, but you never read them yourself? A. I could not state that."

W. H. McDonald, a witness for intervenor, testified as follows:

"Mr. Brown offered me a contract for security, signed by Windom and himself. Q. I wish you would tell us what that contract contained. (Objected to, as incompetent, irrelevant, and immaterial, and not the best evidence. Overruled. Exception.) A. As I remember the contract, it was a contract with Mr. Brown to clear up the title to a piece of land in Hennepin county, and he was to have a one-third interest when the title was perfected from Windom. Q. Did you have occasion to examine that contract? A. I did. Q. It was in some transaction between yourself and Brown that you did examine that contract in reference to taking the security? A. Yes, sir. Q. You were acquainted with the signature of Mr. Windom? A. Yes, sir. Q. Was that signed by William Windom? A. Yes. Q. Do you know the signature of A. C. Brown? A. I did; it was signed by A. C. Brown."

Cross-examination:

"Q. Do you remember anything else about the contract than it refers to some Hennepin county land? A. I remember that Mr. Brown was to have one-third interest. He was to go on and complete that litigation; go on and perfect the title in Mr. Windom, and pay expenses. * * * Q. Do you remember how the parties were described? A. Windom was described as the party of the first part, and Brown as the second party. Q. You don't remember any other terms of the contract except what you have stated? A. That is true. I perhaps could give some more of the conditions. The contract went on and recited that this land was claimed by other parties, and the tax titles were to be cleared up, and the title straightened."

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Re-examination:

"By Mr. Spooner: Q. And there was an assignment attached to that contract? A. There was; it was an assignment by Brown to L. C. Spooner of one-half of his interest. Q. There was an assignment by Brown to Spooner of half interest? A. Attached to it, undivided one-half of Brown's interest. Q. Do you remember how that assignment was attached? A. I think it was fastened with some brass fasteners or stamp; I don't remember. I know it was on the back of the contract."

Charles W. Rhone, sworn in behalf of intervenor, testified as follows:

"Q. Did you have any business with William Windom in connection with any land in Hennepin county? A. There was a contract that the firm had, or rather Mr. Brown assigned the contract (it was a firm matter); a certain contract which Mr. Brown had personally made with Windom, with reference to certain lands in this county. * * * Q. This particular contract to which you refer as being between Windom and the firm of Spooner & Brown was in the name of A. C. Brown. Do you know whether it was signed by Windom? A. It was. Q. Were you acquainted with his signature? A. I was acquainted with his signature. I had seen it in various letters and various contracts. Q. Was William Windom around your office much? A. I have personal recollection of his being in there several times; three or four times; maybe half a dozen times. Q. What was the firm name on the door? A. Spooner & Brown. Q. Did you have any correspondence with William Windom? A. Yes. Q. Did you use the firm's letter heads? A. Yes; on the letter heads was the firm name of Spooner & Brown, and the individual members of the firm. Q. This contract, signed by William Windom, is also signed by whom? A. The contract, as I recall it, was between William Windom and A. C. Brown, signed by each as individuals. Q. Tell us what the contract provided. What were its terms? A. As I recall the contract, it provided that Mr. Brown should bring certain actions in reference to this land in regard to tax title, to reclaim the title. He was to have a percentage interest, and, as I recall it, it was one-third. That is the best of my recollection."

Cross-examination:

"Q. You remember particularly of seeing the agreement that you testified to? A. Yes, sir; I read it at the time, as it was a firm matter. Q. That was an agreement between Windom and the firm of Brown, Spooner & Rhone? A. I do not so recall it. My recollection is that it was an agreement between Windom and A. C. Brown. Q. When was it that you saw it? A. I could not say positively; could only give you the date approximately. It was in the fall of 1885, or early in the winter of 1885; but I think, to the best of my recol-

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lection, in the fall of 1885. Q. Where was it that you saw it? A. In the office of Spooner & Brown, Boston Block. Q. You are sure that property was in Hennepin county? A. Yes. Q. Was that agreement witnessed and acknowledged? A. I could not swear to that. My recollection is it was, but I could not positively swear to it. Q. You are not positive about that being signed? A. Yes. Q. That the signatures were original? A. Yes; I am positive about that. Q. It could not be a copy of the agreement? A. Mr. Brown's signature was original, and the signature of Mr. Windom, if it was a copy, was a very good forgery. Q. Will you swear that that was the original agreement? A. I am perfectly willing to. Q. What makes you willing to do that? A. Because that is the best of my recollection. Q. That is the reason? A. Yes, sir. Q. At this time, do you feel confident that that signature attached to that agreement was Windom's? A. Yes. Q. What makes you confident of that? A. When it became a firm matter, I had a sufficient interest to know whether it was an original, or whether it was a copy; and I think it was in my possession quite a while, among other contracts and papers of the firm, and in the firm's safe. Brown had a personal safe of his own. Q. You had it in your safe because it was a firm matter? A. Yes, sir. Q. You say you put it in your safe? A. It was in the firm safe, in the safe of Spooner & Brown. Q. You knew the firm was interested in the contract? A. Not when it was originally made; no, sir. It was understood it was to be a firm matter. Q. How long did you keep it in the safe of the firm? A. I think until the dissolution of the firm of Spooner & Brown,—until the firm went out of business, some time in June, 1886. Q. You only saw it once, you say? A. I never read it but once, but I think it was in my possession several months. Q. You seem to be sure it was signed by Mr. Windom on account of your being interested in it? A. Yes, sir."

The intervenor, Spooner, who was a member of the firm of Spooner & Brown, testified that he knew the parties Brown and Windom; that he was interested in the contract, and his recollection was that he had seen it on two different occasions; that he advanced money to the firm to redeem land described in the contract from tax titles; that he knew Windom's handwriting as well as that of Brown.

We think there was sufficient evidence to establish the contents of the contract as claimed by the defendants, as well as the assignment by Brown to Spooner of an undivided one-sixth interest therein.

There was no error in the admission in evidence of Exhibit 3, being the contract between Brown and Spooner, wherein it was agreed that Spooner was entitled to have and receive an undivided one-half of Brown's one-third interest in the land described in the contract between Brown and Windom.

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It was admissible to show Spooner's right in the original contract, and to establish his one-sixth interest, as against Brown's or those claiming under him.

Judgment affirmed.

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SUVIAH T. DAVISON v. ELIJAH A. HARMON and Another.[1]

July 7, 1896.

Nos. 9993—(188).

Action against Joint Debtors—Judgment against One—Merger.

Where the plaintiff in an action brought upon a joint contract obligation against the joint debtors elects, upon default of one of them to answer, to enter judgment against such defendant, the judgment is a bar to a subsequent action against the others, the debt being merged in the judgment.

Appeal by plaintiff from a judgment of the district court for Hennepin county, in favor of defendant Sherburne. Affirmed.

Louis A. Reed, for appellant.

A. Ueland, for respondents.

BUCK, J. The plaintiff commenced this action in the district court for Hennepin county against the defendants upon a joint partnership note. The summons was personally served upon both defendants, but the defendant Harmon did not appear, and a separate judgment was entered against him by default on December 29, 1892, for the full amount claimed in her complaint, including interest, costs, and disbursements. The defendant Sherburne answered, and by his answer raised material issues, and after the entry of the default judgment against Harmon he filed a supplemental answer, alleged the entry of the separate judgment by plaintiff against Harmon, and prayed for judgment against plaintiff that the action be dismissed as to him (Sherburne). When the cause came on for trial, the defendant Sherburne moved for judgment on the pleadings, which motion was granted by the court, and judgment was accordingly entered that plaintiff take nothing by this action as to the defendant

[1] Reported in 67 N. W. 1015.

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Sherburne, and that he recover his costs and disbursements against the plaintiff.

That the obligation sued upon is a joint one, must be conceded. Where an action was brought at common law upon a joint contract the general rule was that there could be no judgment except in favor of, or against, all defendants. 1 Black, Judgm. § 82. The same authority states that there are exceptions to this rule; for instance, where one of the defendants sets up and succeeds in establishing a defense entirely personal to himself, as a release or discharge or a personal disability to contract. Consequently, where several persons are summoned as defendants, and one of them pleads, and the others suffer a default, final judgment cannot properly be entered upon the default until the issue as to the other defendants is disposed of, unless the rule has been changed by statute. The plaintiff in this case elected to enter a separate judgment against one of two defendants upon a joint obligation, and, this cause of action being joint, and not several, it cannot be divided, and judgment entered against each one piecemeal. If this could be done, there might be as many separate judgments as there are different or several defendants, and we know of no principle of law which permits it to be done. In the case of Lauer v. Bandow, 48 Wis. 638, 639, 4 N. W. 774, it is said by the court that:

"It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or canceled as to one, and existing and operative as to another joint debtor."

Numerous authorities sustain this position. And if one action is brought against joint debtors, and the plaintiff elects to take judgment against one separately, his rights are no greater than if he had sued each separately. The plaintiff having elected in such case to enter a several judgment upon a joint obligation, the cause of action is merged in the judgment, and the further proceeding against the other defendant would be an attempt to procure a several judgment, while the cause of action sued upon is joint, and thus there would be a variance between the cause of action alleged and the several

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judgment sought to be entered. Hence, if the plaintiff elects to enter a several judgment against one defendant in an action against more than one defendant upon a joint obligation, the cause of action having merged in the judgment against one, it is a bar to a subsequent recovery against the others. See Kingsley v. Davis, 104 Mass. 178; Cowley v. Patch, 120 Mass. 137; Ward v. Johnson, 13 Mass. 148; People v. Harrison, 82 Ill. 84.

We have examined the various provisions of the statute in regard to proceedings by a plaintiff against defendants liable upon a joint obligation, and we do not find any which changes the common law or supports the contention of the appellant. A reference to the statutory provisions bearing upon this subject may be pertinent. G. S. 1894, § 5207, reads as follows:

"When the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:

"First. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise directs; and if he recovers judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served.

"Second. If the action is against defendants severally liable he may proceed against the defendants served, in the same manner as if they were the only defendants.

"Third. Though all the defendants have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone."

This section, it will be observed, authorizes a joint judgment against all of the defendants served where the obligation is joint, unless the court otherwise directs, and judgment may be so entered against all of the defendants jointly indebted, and may be enforced against the joint property of all and the separate property of the defendants served; but it does not authorize a several judgment against each defendant unless he is severally liable, in which case the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. Of course, this section does not aid the plaintiff, although he relies upon the last subdivision of the section in support of his view of the case. While this subdivision is not quite as explicit as it might be, yet, fairly construed, it means

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that a several judgment can only be taken against any one of the defendants when the plaintiff would be entitled to a judgment against such defendants if the action had been against them alone. But if an action had been against them alone, upon a joint obligation, they would not be entitled to a several judgment, as that would be a variance from the cause of action stated in the complaint. If such a judgment should, however, be entered, it would be at the plaintiff's risk, and by his election he would be barred from recovering a judgment against the other defendants, as under the rule at common law. In Johnson v. Lough, 22 Minn. 203, this court held that in an action founded on a joint demand arising on contract, whether all the defendants are served with summons or not, the only judgment that can be rendered is a joint one in favor of or against them all. Section 5410 of said statute reads as follows:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

This section does not aid the plaintiff, because the judgment authorized is one against a several defendant or defendants, and not against one or more joint defendants. The number of the defendants is not the test of the manner of entering judgment under this section, especially when all of them stand on precisely the same ground, and all have been summoned. The judgment must be based upon the pleadings, and, where that shows a joint obligation, as the one sued upon, there should not be a several judgment entered. Section 5411 reads as follows:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

This section is not applicable, because it covers cases where the action is against several defendants, and it is only in the discretion of the court that a judgment may be rendered against one or more of them, leaving the action to proceed against the others, and then only in cases wherein a several judgment is proper. As a several judgment upon the joint cause of action was not proper in this case, it is quite apparent that the section is not applicable.

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There is no provision in the statute which is applicable to the case at bar. A several action could not properly have been brought upon the joint obligation set forth in the complaint; and if the plaintiff desired to have his joint cause of action saved as against the defendant Sherburne, he should have waited, and not entered judgment against Harmon until the issues raised by Sherburne's answers were disposed of. It was, therefore, irregular for the plaintiff to proceed and take a several judgment against the defendant Harmon, but, he having elected to do so, it constitutes a bar to any further recovery against the other defendant, Sherburne.

Judgment affirmed.

STATE OF MINNESOTA ex rel. H. G. TRACY v. CLAYTON R. COOLEY, County Auditor.[1]

July 7, 1896.

Nos. 10,001—(56).

Mandamus—Res Judicata.

State v. Cooley, 58 Minn. 514, followed, to the effect that the respondent is not estopped, by the judgment on a former application for mandamus, from alleging that the school district of which relator was treasurer had been dissolved.

School District—Dissolution—Presumption of Continued Existence—G. S. 1894, § 3648.

Where an independent school district has been dissolved pursuant to statute, no presumption in favor of the continued legal existence of the district under G. S. 1894, § 3648, arises from the fact that certain inhabitants of the former district have persisted in the usurpation of corporate powers for one year after the dissolution.

Constitution—Delegation of Legislative Powers—G. S. 1894, § 3813.

Laws 1885, c. 170 (G. S. 1894, § 3813), providing for the dissolution of independent school districts, is not unconstitutional as being a delegation of legislative powers.

Appeal by relator from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial. Affirmed.

Savage & Purdy, for relator.

Wilson & Van Derlip, for respondent.

[1] Reported in 68 N. W. 66.

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MITCHELL, J. This is a second edition of State v. Cooley, 58 Minn. 514, 60 N. W. 338. It does not appear from the record what disposition was made of the former case after it was remanded to the district court, but subsequently the same relator applied for another writ of mandamus to compel the respondent as auditor of Hennepin county to issue a warrant for the payment from the public school funds in the county treasury of certain money to which it was alleged the independent school district of Minneapolis Park was entitled, and of which district relator claimed to be treasurer. The defense in this, as in the former action, was that there was no longer any such district; that it had been legally dissolved in July, 1893, pursuant to the provisions of Laws 1885, c. 170 (G. S. 1894, § 3813). The trial court found that the district had been lawfully dissolved, and ordered that the alternative writ be discharged. From an order denying a new trial the relator appealed.

1. That the judgment by default against the respondent in January, 1894, granting a peremptory writ of mandamus against him to pay other moneys to the relator, does not estop him from denying in this action the existence of the school district, is settled by the decision in State v. Cooley, supra. Indeed, we are strongly inclined to the opinion that the proposition that the doctrine of res adjudicata could not be invoked might be put on the much broader ground that the respondent, as a public officer, could not, by any act or omission of his, estop the public, whom he represents. But it is unnecessary to enter upon the discussion of that question.

2. It appears that, notwithstanding the dissolution of the district in 1893, the relator and others, denying its validity, persisted in attempting to keep up the organization of the district by holding elections, hiring teachers, and keeping a school. This they had continued to do for more than a year from and after the date of the dissolution of the district. Upon that state of facts the relator invokes the benefit of the conclusive presumption declared by G. S. 1894, § 3648, in favor of the legality of the organization of school districts which shall have exercised the franchises and privileges of a district for the term of one year. If a district is legally dissolved, and this fact is made to appear, this statutory presumption would not obtain. The object of the statute was to relieve districts which might have been irregularly organized from the necessity of proving the

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technical regularity of their organization, and to protect their organization from collateral attack on the ground of irregularity after the lapse of a year. State v. School District, 54 Minn. 213, 55 N. W. 1122. It was never intended to be used to support the unwarranted usurpation of corporate powers where there was never any honest attempt to organize a district, or to support a persistence in such usurpation after a district had been legally dissolved. If that be not true, then a minority, however small, could not only nullify the action of the majority, but even override positive legislative enactments; for otherwise all they would have to do to continue the existence of a district would be to persist in the usurpation of corporate powers for a year after the majority had voted or the legislature had enacted a dissolution.

3. The further objection is made that the statute providing for the dissolution of independent school districts is invalid, as being an unconstitutional delegation of legislative powers. The statute may be a very imperfect and improvident one, but we do not think it is subject to the objection urged against it.

"Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the legislature in its wisdom may impose. They may take effect only upon the happening of events which are future and uncertain; and, among others, the voluntary act of the parties upon whom they are designed to operate. They are not the less perfect and complete when passed by the legislature, though future and contingent events may determine whether or not they shall ever take effect. * * * So the legislature may confer a power without desiring to enforce its exercise, and leave the question whether it shall be assumed, to be determined by the electors of a particular district. The legislature may determine absolutely what shall be done, or it may authorize the same thing to be done, upon the consent of third parties. It may command, or it may only permit; and in the latter case, as in the former, its acts have the efficacy of laws."

Field, J., in People v. Burr, 13 Cal. 343, 358.

That it is not essential that a statute must, in any event, take effect as a law at the time it leaves the hands of the legislature, but that its taking effect or its application may be made conditional, is a principle to which the writer personally has always thought this court did not give due weight in Harrington v. Town of Plainview, 27 Minn. 224, 6 N. W. 777.

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In the present case the legislature has not delegated any legislative power. It has itself acted, and declared when an independent school district shall be dissolved, to wit, whenever two-thirds of the legal voters voting at a special election called for the purpose of ascertaining their views on the subject express their opposition to the further continuance of the district. When that condition arises, then the district is dissolved, not by the voters, but by the legislative act itself. In urging that the act is obnoxious to the constitution as being special legislation, counsel has overlooked the facts that it was enacted prior to the constitutional amendment of 1892;[2] also that Laws 1865, c. 13, relating to independent school districts, was repealed by the revision of 1866. Some of the other objections to the law urged by counsel may go to its expediency, but none of them, in our judgment, affect its validity.

4. In our opinion, the evidence justified the finding that the district had been dissolved in accordance with all the substantial requirements of the statute; and there was no prejudicial error on part of the court in either the admission or rejection of evidence.

Order affirmed.

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65 409
66 470

JOSEPH SCHLITZ BREWING COMPANY v. CLARENCE H. CHILDS, Assignee.[3]

July 7, 1896.

Nos. 10,020—(215).

Chattel Mortgage—Partial Invalidity as Preference—Validity as to Balance.

On April 2, 1895, W., being insolvent to the knowledge of S., executed to him his two promissory notes, the consideration of which was a past-due indebtedness of $888.83 and a then present loan of $300, made by S. to W., and secured the whole amount by a chattel mortgage. This loan was not made for the purpose of inducing W. to secure the past indebtedness, but to enable him to continue his business with the expectation that he might thereby pay his debts; and S. was not guilty of any fraud in fact in taking security for his debt, but the same was void as a preference under the in-

[2] Const. art. 4, § 33.

[3] Reported in 68 N. W. 65.

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solvency laws of this state. W. made an assignment under such laws for the benefit of his creditors to the defendant, May 15, 1895, who took possession of the property described in the chattel mortgage. *Held* that, while the mortgage was void as a preference as against the assignee, so far as it secured the past indebtedness, it was valid as a security for the loan, and that the plaintiff is entitled to maintain this action to recover possession of the property covered by the mortgage.

Appeal by plaintiff from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial. Reversed.

A. D. Smith and *Rea, Hubachek & Healy*, for appellant.

James D. Shearer, for respondent.

BUCK, J. On March 30, 1895, one John M. Wark was engaged in the retail saloon business in the city of Minneapolis, and was then indebted to this plaintiff in the sum of $888.83 for money loaned on two separate occasions in the year 1894, and which was past due and unsecured. He had been a customer of plaintiff for several years, with a good reputation, and reliable in business matters. He held a license to sell liquor, granted by the city of Minneapolis, which would expire the next day, and had no money with which to purchase a new license. The plaintiff knew of an unexpired license which then had three months to run, and informed Wark of it, who requested plaintiff to loan him $300 with which to purchase the unexpired license, Wark then stating to plaintiff that if he could get the license he would, by the time it expired, be able to purchase a new license for a year, and continue his business, as it was increasing, and he expected to get some money from the West. Wark was owing at this time somewhere from $2,651 to $5,600, the exact amount not definitely appearing. His estate was worth $3,500. Only one creditor was pressing him for payment, and he was willing to give him time. Of this claim plaintiff knew, except he had no knowledge of the amount. Plaintiff never pressed Wark for payment, and told him to pay when convenient, which he did weekly, and plaintiff believed him to be solvent. Plaintiff asked Wark for his financial condition, and Wark told him that he owed about $2,000, and that his assets were about $4,000, which statement plaintiff testified he believed to be Wark's true financial condition.

At this time—March 30, 1895—they went to the office of plaintiff's attorney to have a chattel mortgage executed for the past indebted-

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ness, and also to include the $300 which plaintiff was to loan Wark to purchase the unexpired license, but Wark, expecting his brother from Montana, concluded to wait until the next day, when he thought he could get the money from him without security. Not succeeding in this, Wark, on April 2, 1895, executed to the plaintiff a chattel mortgage for $1,188.83, which included the past indebtedness and the $300 then loaned by plaintiff to Wark, who immediately used it in purchasing the unexpired license, all of which was done to enable Wark to continue in his business.

On May 15, 1895, Wark made a general assignment by deed in writing of all his unexempt property for the benefit of his creditors under the insolvent laws of this state. This assignment was made by reason of certain actions commenced against him by several of his creditors, and this defendant is the assignee under such insolvency proceedings. This chattel mortgage covers the property in question for which the plaintiff brought this action in replevin, and upon trial without jury the court below found in favor of the defendant.

It is contended by the appellant that at the time of giving the mortgage plaintiff had not reasonable cause to believe that Wark was insolvent. But the trial court found otherwise upon this point, and we cannot say that the evidence is so manifestly and palpably against this finding as to disturb it. It must, therefore, be held that plaintiff received the chattel mortgage as a preference as to the $888.83, but as to the $300 the mortgage stands upon an entirely different ground. The mortgage for this sum was not given by Wark or taken by plaintiff as a preference, or to induce Wark to secure the past indebtedness. The evidence upon this point is uncontradicted.

The money was loaned Wark to enable him to continue his business. This did not constitute a fraud upon his creditors. It did not injure their rights or damage their interests. It took nothing from the debtor's funds, but added to them, to enable him to go on with the same kind of business in which he then was and had been engaged. For this purpose he used the $300 immediately. In this proceeding there was not, and could not well be, any preferential taint. The $300 was a fund by itself, used for the benefit of all parties, and, while secured by the same mortgage, the amount is severable from the $888.83, and thereby in no manner lessens the plaintiff's right of

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recovery thereon, no more so than if the plaintiff's mortgage was simply $300, and it had brought replevin to recover for property mortgaged to secure that amount. It is immaterial that one mortgage or instrument secured another debt besides the $300. The exact amount appears from the evidence, and there was no need of computation to definitely ascertain the precise sum. Had there been two mortgages, one for the $300 and another for the remaining past indebtedness, there could have been no serious controversy about it; and upon principle we think that there is no difference. No technical rule should be applied in such case to defeat that which appears to have been an honest transaction between the parties.

In Baumann v. Cunningham, 48 Minn. 292, 51 N. W. 611, it was held that, in order to avoid a conveyance whereby it is alleged that one creditor has obtained the fraudulent preference mentioned in Laws 1881, c. 148, § 4,[2] it is necessary that not only shall insolvency of the debtor exist, and the creditor shall have reasonable cause to believe it so to exist, but, in addition, that the conveyance shall have been made with a view of giving a preference. In that case the debtor, while insolvent, executed notes and mortgages, with a view of being able thereby to continue his business, and the mortgagee had knowledge in a technical sense that the debtor was insolvent, but upon the facts and finding of the trial court this court held as we have above quoted. The finding of the trial court in that case, however, upon the facts was in favor of the validity of the notes and mortgage.

We sustain the trial court in this case as to the invalidity of the mortgage so far as it secures the payment of the past indebtedness of $888.83, but hold that the mortgage is valid as to the $300 thereby secured, and for that amount, with accrued interest, the plaintiff has a lien on the property, and a right to maintain this action.

The order denying plaintiff's motion for a new trial is reversed, the cause remanded, and the trial court directed to proceed therein not inconsistently with this opinion.

CANTY, J. I concur in the result. Although plaintiff knew that Wark was insolvent when it took the chattel mortgage from him, it did not enter into any deliberate scheme to evade the provisions of the insolvency law prohibiting preferences, as seems to have been the

[2] See G. S. 1894, § 4243.

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case in Thompson v. Johnson, 55 Minn. 515, 57 N. W. 223, where the creditors of the insolvent debtor took the property of the insolvent for the debts due them, but paid some cash for the very purpose of taking the transaction out of the statute. As the statute does not apply to a cash transaction, and the cash consideration could not be separated from the consideration furnished by the previously existing indebtedness and the property apportioned accordingly, the parties seemed to have conceived this scheme as a way to beat the statute. But in the present case the parties did not enter into any such scheme. The creditor did not act in positive bad faith. The cash part of the transaction can be separated from the part of the transaction giving a preference to the prior existing indebtedness, and as to the latter the transaction should be set aside. But for the cash advanced plaintiff is entitled to retain its mortgage on all the mortgaged property. In my opinion, the case of Baumann v. Cunningham has little or no bearing on this case.

JOHN A. TEN EYCK, Executor, v. JULIAN H. SLEEPER.[1]

July 7, 1896.

Nos. 10,032—(164).

Lease—Agreement to Reduce Rent—Consideration.

On February 26, 1890, E. leased to S. for the term of ten years an hotel situate in the city of St. Paul, at a rental of $500 per month. S. occupied the hotel until about October 12, 1893, when, by reason of the great depression in the hotel business where said hotel was located, he became insolvent and financially unable to pay the accruing rent, and for such reason was about to abandon the premises, and leave them vacant, whereupon the parties executed a written modification of the lease upon the back thereof, whereby it was agreed that the rent should be reduced to $350 per month from May 1, 1893, to May 1, 1897, and that E. should make certain repairs on the hotel property necessary to protect it, as asked for by S.; and thereupon S. agreed to use and continue to occupy the premises for hotel purposes, which he did until February, 1895, when he became insolvent and unable to continue the hotel business any longer. By the terms of the original lease,

[1] Reported in 67 N. W. 1026.

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S. was not bound to use or occupy the property for hotel or any other purpose. S. paid the rental of $350 per month until February, 1895, amounting to nearly $6,000, and receipts were given in full payment and settlement of rent to February, 1895. Upon an action brought by E. to recover the full rental of $500 per month, *held*, that the written modification of the lease rested upon a sufficient consideration.

Action in the district court for Ramsey county for the recovery of rent at the rate of $500 per month as stipulated in a lease. The answer set up a subsequent written agreement modifying the terms of the lease, whereby the rent was reduced to $350 a month. The case was tried before Egan, J., whose findings of fact are substantially included in the statement of the case contained in the opinion, and who found as conclusions of law that the agreement was made on sufficient consideration and that plaintiff was entitled to judgment for the rent due thereunder, at the rate of $350 a month, amounting to $1,806.15. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Briggs & Countryman, for appellant.

W. J. Romans, for respondent.

BUCK, J. This is an action upon a written lease of an hotel to recover the agreed rental. The lease was made between the defendant, Sleeper, as lessee, and John A. Ten Eyck, Sr., since deceased, as lessor, dated February 26, 1890, and was so made to run for a term of ten years from May 1, 1890, at a monthly rental of $500. The lessee took possession under the lease, and remained in possession until March, 1895, when he made an assignment for the benefit of his creditors. In 1891 the lessor, Ten Eyck, died, and this plaintiff qualified as his executor. In October, 1893, the defendant complained to the executor of the depression in business, and declared that he was unable to pay the agreed rental. The property leased is what is known as the "Sherman House," used for hotel purposes, and situate in the city of St. Paul. The lease provided that the lessee should keep the premises in good repair during the entire term. Soon after October 1, 1893, he refused to pay further rental, and refused to continue to occupy the premises under the lease, and notified the plaintiff that he would pay no more rent under or according to its terms, and would vacate the premises. The parties thereupon made the follow-

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ing agreement, which was written by the executor upon the back of the lease, as follows:

"In consequence of the general depression of the times, the terms of the within lease are hereby modified so as to reduce the rent from October 1st, 1893, to May 1st, 1897, to three hundred and fifty dollars per month, and after May 1st, 1897, the original terms of the lease shall be resumed. It is also agreed to make the repairs asked for by Mr. Sleeper as a necessity to protect the property shall be made by the estate of John A. Ten Eyck, deceased. St. Paul, Oct. 12th, 1893.

"[Signed] John A. Ten Eyck, Executor.
"[Signed] J. H. Sleeper."

It appears that, when this agreement was made, the defendant was insolvent, and was unable to pay the further rental of $500 per month, and therefore would not occupy the premises any longer. Before this time the plaintiff had learned the following facts, viz.: That the defendant's hotel business was running behind; that the volume of business in the locality of the hotel had decreased; that the hotel business in the city of St. Paul was greatly depressed; that the growth and development of the city of St. Paul and street-railway lines in other parts of the city had tended to draw away from the location of the Sherman House business and traffic, and the value of the hotel for such purpose had decreased; that the hotel is an old wooden building, and required a large expense for preserving the same, and keeping the same inviting and attractive for hotel or any business purpose; that defendant was unable to and could not carry out the terms of the original lease; that defendant was insolvent; and that the prospect of renting said hotel and building in case the same became vacant was a matter of uncertainty. With this knowledge, and believing that Sleeper would vacate the premises, he made the agreement so indorsed upon the lease, as being for the great interest and advantage of all the persons interested in the estate, and to save it and such persons from great damage and loss, by having said premises vacated, and the rent thereupon cease. While, by the terms of the original lease, the defendant was bound to make all proper repairs, and keep the premises in good condition, yet there are no terms in the lease requiring him to use the premises for hotel or other purposes. Upon these facts, the parties agreed upon a modification of the terms of the lease, so as to reduce the monthly rental to $350

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per month, and that plaintiff would make certain repairs asked for by the defendant.

The sole question presented upon these facts is whether a contract fairly made by competent persons, with full and equal knowledge of all the facts, can be repudiated by one of the parties, who concedes that such contract was beneficial to him, and which the facts show to be so, and he can so repudiate the contract after it had been acted upon for a period of 16 months, and he has received such profits to the amount of nearly $6,000, and receipted therefor in full, upon the ground of want of consideration. It is quite evident that the parties mutually understood and agreed that, by reason of the insolvency of the defendant and the general depression of business, it was impossible for him to make the full rental payments of $500 per month. It was not mere willfulness or obstinacy on the part of the defendant in refusing to pay the rental or occupy the premises or make repairs, but a financial inability, brought about by the unforeseen depression in the business for which the premises were leased, and in which the defendant was engaged. It was upon the existence of the facts herein stated that the parties mutually executed the modification of the lease, which we have quoted.

The plaintiff contends that these facts show a voluntary promise on the part of the lessor to accept a sum less than the amount of the rent called for by the existing lease; that although the modified lease shows actual payment thereunder of the reduced amount, and continued occupation under the lease, still these facts constitute no bar to a recovery of the balance of the stipulated rent, upon the ground that there was no consideration for the modified contract, and that the parties remain just where they placed themselves by their original contract. In support of this view, he cites the case of Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860. That was a case where the lessee, by the terms of the written lease, promised to pay rent for certain premises at the rate of $250 per month for five years, but, not paying promptly, the lessor reduced the rent to $208.33, and then to $150, per month, upon condition that such rent was paid punctually. This the lessee failed to do, and the lessor brought suit for the full rental of $250 per month, according to the terms of the original lease, upon the ground that the de-

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fendant had failed to pay according to the terms of the modified lease. The plaintiff recovered, upon the ground that the alleged modification was a gratuitous parol promise. But the right to defend in this action against a recovery upon the terms of the original lease is claimed to rest upon the principle that the written modification is supported by the facts which show a valid consideration, and make it a binding contract, especially as it has been executed,—that is, performed from October, 1893, until February, 1895,—and nearly $6,000 paid pursuant to such modified contract. Certainly, the facts in the case of Wharton v. Anderson are not analogous to those at bar.

We may concede that mere inability on the part of defendant to pay rent would not alone constitute a consideration for a binding promise on the part of the lessor to accept a less amount than is provided by the terms of the original lease; but when the lessee, by reason of the great and unforeseen depression in the business in which he is engaged, and for which the premises are rented, becomes insolvent, and is likely so to continue for such season, whereby he would be compelled to vacate the premises, and cease doing business, and not keep them in repair or inviting and attracting to the public, and the premises thereby become greatly impaired in value, with great doubt as to whether the premises could be seasonably rented, we think that these facts show a sufficient consideration for a binding written agreement on the part of the lessor to accept a less rental sum than the amount provided in the original lease. In so doing, we are not trenching upon the doctrine that a promise by one party to a contract, to the other party, to prevent a breach of the contract, is without consideration.

"Consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the plaintiff, or some detriment to the defendant."

Thomas v. Thomas, 2 Q. B. 851, 859.

In Copper v. Fretnoransky (Com. Pl.) 16 N. Y. Supp. 866, it is said that it is an elementary principle that a legal possibility of benefit to the contractor or detriment to the contractee is a sufficient consideration to support an agreement. That was a case of the renting by a written lease of certain premises for the term of one year, at a rental of $800 per annum, payable quarterly in advance. At the expiration of six months, the lessee was in the act of removing from

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the premises, when the lessor said to him that, rather than have the premises idle, he would not charge him for one quarter's rent then unpaid, whereupon the lessee resumed his occupancy; and it was held that this agreement rested upon a valid and sufficient consideration. In the case of Jaffray v. Greenbaum, 64 Iowa, 492, 20 N. W. 775, the tenant was unable to pay the rent, which was reduced by the agreement of the parties. In the opinion, the court uses this language: [2]

"A lease which provides for too high a rent may be less valuable to the landlord than one providing for a proper rent, and especially if the tenant is a merchant, and can do business only by purchasing goods upon credit. The lease in question, with the rent reduced, was preferred by these landlords, as is shown by the fact that they made the reduction on purely business considerations. They desired that their tenants should continue in business under circumstances which should afford more assurance of success. The tenants made arrangements to continue, and did continue, and paid rent at the rate of $800 per quarter for several quarters."

This appears to be one of the elements which entered into the opinion of the court in holding that there was a sufficient consideration for the reduction of the rent. The case of Raymond v. Krauskopf, 87 Iowa, 602, 54 N. W. 432, was one where the plaintiff leased a farm to the defendant at a rental of 16 bushels of corn per acre; but severe storms injured the crops, and the tenant informed the landlord that there would not be enough corn raised to pay rent, and that he would not farm the land unless a new arrangement was made; that he proposed to surrender the land to the landlord, and obtain employment by the month; and thereupon the landlord told him to farm the land, and he would accept one-half the corn raised, in full of all demands; and the tenant replanted the land, and delivered more than half of the corn to the landlord, and it was held that this agreement rested upon a sufficient agreement, and was binding.

In the case at bar it is unquestionable that the tenant was insolvent and unable to continue the business. It is equally certain that he would vacate the building, and leave it idle or unoccupied, if the agreement for reduced rent and promise to repair had not been made. The terms of the lease do not require him to use it for hotel or other purposes. From the plaintiff's own testimony, it is apparent that the hotel could not be rented for the sum of $500 per month.

[2] At page 499.

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It was therefore a benefit to the landlord that the hotel should continue to be occupied with the new rental to be paid as agreed upon by the parties, and that, to this end, the landlord should make the repairs which he did. The repairs were for the benefit of both parties. They aided in preserving the building and making it more useful. The reduction of the rent and making repairs induced the lessee to retain the occupancy and use of the building, and carry on the hotel business, which gave the landlord a rental therefrom; and, though at a reduced rate, yet the chances were that for some time he would not have received any rent if the premises had not been retained by the lessee. As we have already stated, these facts show that the modified agreement rested upon a valid and sufficient consideration.

Order affirmed.

MITCHELL, J. I think that the continued occupancy and use of the premises by the defendant for the hotel business, to which he was not bound under his lease, constituted, under the circumstances, a sufficient consideration for the agreement to reduce the rent, at least so far as it has been executed. I therefore concur in the foregoing opinion.

CANTY, J. So do I.

STATE OF MINNESOTA ex rel. HENRY W. CHILDS, Attorney General, v. DANIEL C. DARROW.[1]

65 419
107 Wis 669

July 7, 1896.

Nos. 10,148—(322).

City of Moorhead—Ordinance—Approval by Mayor—Publication.

Under the charter of the city of Moorhead, all ordinances, resolutions, and by-laws of its city council of a legislative nature must, before they take effect, be approved by the mayor (or passed over his disapproval by a two-thirds vote, taken by yeas and nays, of the members of the council present and voting), and published in the official paper of the city.

Subdivision of Ward.

The subdivision of the wards of the city is a legislative act.

[1] Reported in 67 N. W. 1012.

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Same—Resolution of City Council—Retroactive Effect.

A certain resolution of its city council, which was approved by the mayor and published in the official paper, *held* to be sufficient to subdivide a ward as of the date of its passage, but not to have a retroactive effect, so as to validate a prior invalid attempt to subdivide it.

Action in the nature of quo warranto to oust respondent from the office of alderman of the Fourth ward of the city of Moorhead. Judgment of ouster.

H. W. Childs, Attorney General, *L. Von Bornstedt*, and *Ira B. Mills*, for relator.

F. H. Peterson, for respondent.

BUCK, J. The city of Moorhead is a municipal corporation organized under the provisions of Sp. Laws 1881, c. 28, and the several acts amendatory thereof. Prior to the time of the proceedings out of which this controversy arose, the city was divided into three wards, from each of which two aldermen were elected.

Section 3 of chapter 1 of the charter contains a provision which is as follows:

"That after the organization of said city the council may from time to time make such re-division of the city into wards as may be required by the public interests; but no ward shall be created that shall contain less than one hundred legal voters."

The charter contains no other authority for the division of wards. Part of section 2 of chapter 3 of the charter reads as follows:

"All ordinances and resolutions shall before they take effect be presented to the mayor, and if he approve thereof he shall sign the same; and such as he shall not approve he shall return to the city council with his objections thereto, by depositing the same with the city recorder to be by him presented to the city council at their first meeting thereafter; and upon the return of any ordinance or resolution by the mayor, the same vote by which the same was passed shall be reconsidered, and if, after such reconsideration, the city council shall pass the same by a two-thirds vote of those present and voting, it shall have the same effect as if approved by the mayor and in such case the vote shall be by ayes and noes, which shall be entered in the record by the city recorder. If an ordinance or resolution shall not be returned by the mayor within five days after it shall have been presented to him, the same shall have the same effect as if approved by him."

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Section 18 of chapter 3 of said charter provides that

"The city council shall designate a newspaper printed in the city, in which shall be published all ordinances and other proceedings, and matters required to be published in a public newspaper, the publisher of which shall be termed the city printer."

Section 1 of chapter 4 provides that

"The mayor and aldermen shall constitute the city council and the style of all ordinances shall be: 'The council of the city of Moorhead do ordain.'"

Section 5 of chapter 4 of the charter provides that

"All ordinances, regulations, resolutions and by-laws shall be passed by an affirmative vote of a majority of the members of the city council present, by ayes and noes, and be published in the official paper before same shall be in force."

At the time of the proceeding by the city council hereinafter referred to, there was a duly-elected city printer, and an officially designated newspaper, in the city of Moorhead. On January 6, 1896, at a regular meeting of the city council, one of the aldermen offered a resolution for the division of the Second ward, and that a committee of three from the council or citizens of the ward be appointed to make report to the council on the first Monday in February, 1896, as to the proper division and boundary of the said ward. This resolution does not appear to have been acted upon by the city council, but it appears from stipulation of the parties that the committee refered to in the resolution was appointed by the mayor, and it made a report, which is as follows:

"City Hall, Feb. 3rd, 1896.

"To the Hon. Mayor and City Council:

"Gentlemen: Your committee, appointed at the last monthly meeting of the city council, to report on the division of the Second ward of said city, respectfully report that we have made a thorough examination and find that it is in accordance with the wishes of the taxpayers of said ward to have the same divided, and we would respectfully recommend that said division be made, commencing at a point in the center of N. P. R. R. and Fifth street, running south on said Fifth St. to the center of Garroway St.; thence east to a point on the division line between block 7 of White's Second addition and block 4 of Briggs & Elder's addition; thence south on that line to South street; thence south through Fifth street to the city limits. And we further recommend that the territory west of the above-de-

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scribed land be known as the Second Ward of the City of Moorhead, and the territory on the east of the same line be known as the Fourth Ward of the City of Moorhead.

"[Signed] Ole Martinson.
"Warren Onan.
"J. W. Edling.

"Adopted Feb. 3rd, 1896."

These proceedings are all that appear from the records of the city council in regard to the creation of any new ward in said city, or any attempt thereat, prior to May 4, 1896. The proceedings above referred to were never presented to the mayor of the city for his approval, and he never affixed his signature to the same, or formally approved them, although he was present at the meeting when said proceedings were taken, and, as the presiding officer, took part in such proceedings.

Conceding that at and during all the time of these proceedings there was an officially designated newspaper published and printed in the city of Moorhead, yet it must also be conceded that no resolution, ordinance, regulation, or by-law in regard to the redivision of the Second ward of said city was ever presented to or approved by the mayor, and therefore the same could not possibly have been published, so approved, in the officially designated paper, although the foregoing proceedings were published in such newspaper, and it is claimed by the respondent that such publication was sufficient, if any were necessary at all. Assuming, without deciding, that the parol evidence as to the proceedings of the city council at the time when the report of the committee was under consideration was admissible, it is insufficient to establish the fact that the ayes and noes were taken upon its adoption, and, as there is no record evidence to this effect, we must find that such was not the fact.

On March 17, 1896, there was an election held in the city of Moorhead for the election of city officers, including the election of aldermen; and the electors of said city residing in that portion designated in the report of the committee as the "Fourth Ward" elected as one of the aldermen for said ward for the term of one year this respondent, Daniel C. Darrow, who qualified in the manner provided by law, and ever since has been acting as such alderman in the proceedings in the city council of the city of Moorhead upon matters coming before said council for its action, claiming the lawful right

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to represent said Fourth ward, and to hold and exercise the office of alderman from said ward, by virtue of said election.

Subsequent to the time of the foregoing proceedings, and on May 4, 1896, at a regular meeting of the city council, a resolution was passed, by a unanimous vote, whereby the council sought to ratify the proceedings of the city council of January 6, 1896, and February 3, 1896, in regard to the division of the Second ward, and the action of the mayor in appointing said committee. A part of said resolution is as follows:

"Now, therefore, be it resolved that all of said proceedings as above stated be, and the same hereby are, ratified and confirmed, and that said Fourth ward be in all things recognized as existing from the time of the adoption of said report and the declaration of the establishment of said Fourth ward, on the 3d day of February, 1896. Be it further resolved that this resolution be spread upon the minutes of this council, and published once in the official paper of the city of Moorhead.

"Approved May 4th, 1896.

"Sam'l Frazier, Mayor."

Which resolution was on the same date duly approved by the mayor, and duly published, by order of said council, in the official paper of the city, on May 8, 1896. This resolution was passed by the unanimous vote of all the aldermen, upon a call for ayes and noes.

Thus two questions are presented for our consideration, viz. the legal effect of the proceedings prior to the election of the respondent, involving the question of the validity of the election of respondent as alderman from the Fourth ward, and the effect of the proceedings of May 4, 1896, regarding the division of the Second ward into two wards, one of which was designated as the "Fourth Ward."

The power of a municipal corporation to pass ordinances, resolutions, by-laws, and make regulations is derivative. The primary jurisdiction, in matters of a legislative nature, rests with the legislature itself, which, however, it may confer on a municipal corporation, so far as may be necessary to carry out the purposes for which it is formed, although such corporation has no power to pass general laws.

The charter of the city of Moorhead, authorizing a subdivision from time to time of the wards of said city, is one permitting the exercise of a legislative act. Sower v. City of Philadelphia, 35 Pa. St. 231. This act should be done by an ordinance or resolution. In such case

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either must be passed by an affirmative vote of a majority of the city council, upon a call of the ayes and noes, then presented to the mayor, and, if he approve, then by due publication in the official newspaper of the city. A proceeding which redivides a ward of a city is one of great importance to the people residing therein, and their rights should not be affected without due consideration, and notice by publication, as required by the charter. The report of the committee which was adopted by the council was neither an ordinance nor resolution, and did not give that information to the people of the attempted redivision to which they were entitled under the law.

While the mayor is a member of the city council, by the terms of the charter, and is therefore authorized to take part in its proceedings, yet when ordinances and resolutions are passed a further duty devolves upon him, not as a member of the city council, but as an independent, co-ordinate branch of the city government, and he is given five days' time to examine them, and, if necessary, disapprove them, if there has been hasty and ill-advised legislation or proceedings affecting the rights and interests of the people. Frequently the existence of this power, and occasionally its exercise, is of great benefit, and serves to create respect and due regard for a co-ordinate authority. For a city council to utterly ignore the executive branch of the city government, and seek to legislate upon governmental matters by a proceeding in substance a resolution or ordinance, and thereby claim that such proceeding need not have the mayor's approval, or be duly published in the official paper of the city, is a mere evasion of the law. We do not, of course, refer to a mere rule of practice which a council might adopt; but the substantial purpose of legislative proceedings should not be defeated by giving to ordinances or resolutions a form of motions or reports.

Restriction upon legislative power is sometimes unpleasant for those who seek to exercise it, but it is nevertheless a wise provision, and sanctioned by the experience of ages, not merely because a city council may sometimes be governed by improper motives, but because its members may often be mistaken, and the people are entitled to the judgment of their executive officer thereon. If the city council could pass the act in controversy, and make it effective, without the approval of the mayor, we do not see why they could not pass a hundred others of a similar nature, affecting the interests of the people, and

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the charter authorizing ordinances and resolutions would be a complete nullity.

We hold, therefore, that the report which was adopted did not have the effect of an ordinance or resolution, as it was not presented to or approved by the mayor, and was not published in the official paper of the city of Moorhead; and the said Second ward was not thereby redivided, and the Fourth ward not duly established.

As to the effect of the proceedings of the city council of May 4 but little need be said. At a regular meeting of the council upon that day, upon a call of ayes and noes, by unanimous vote of all the aldermen voting, a resolution was passed redividing the Second ward, and forming therefrom the Fourth ward, of said city, which resolution was presented to the mayor, approved and signed by him, and duly published in the official paper of the city of Moorhead. We are of the opinion that this was a sufficient compliance with the law, and that the Fourth ward of said city was thereby established as of that date, but that the resolution could not have any retroactive effect.

We are of the opinion that the respondent is holding the office of alderman for the Fourth ward in the city of Moorhead, in this state, contrary to law; and it is therefore adjudged that the said respondent, Daniel C. Darrow, is guilty of unlawfully holding and exercising the office of alderman for the Fourth ward in the city of Moorhead, in this state. And it is further ordered and adjudged that said Daniel C. Darrow be ousted and excluded from said office of alderman, and that judgment be entered accordingly.

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J. R. S. COSGROVE and Another v. JOHN McKASY, Assignee.[1]

65 426
74 358
65 426
75 146

July 8, 1896.

Nos. 9699—(12).

Payment by Sureties—Set-Off against Note to Insolvent Principal—Contribution.

J. R. S. C. and J. A. C. were two of the five sureties upon a joint and several bond to a county, executed and delivered, that the principals in the bond, co-partners doing a banking business, might be designated a depositary for county funds, under the provisions of G. S. 1894, § 729 et seq. They were also indebted to said principals upon a promissory note, but in fact J. R. S. C. was the principal upon the note, while J. A. C. was a mere surety. While having county funds in their hands, the principals on the bond made an assignment, under the laws of this state, for the benefit of all of their creditors. The makers of the note then filed a petition with the district court, in which it was alleged that they had paid to the county a certain sum of money, which was one-half of the amount of county funds on deposit when the assignment was made, and petitioned that the amount of said payment might be offset as against the note in the hands of the assignee in insolvency.

Held, upon the allegations in the petition, and the fact that J. A. C. was a mere surety upon the note, that he was not entitled to have any part of the amount so paid by him to the county offset as against the note.

Held, further, under the allegation in the petition, and the rule that, when two or more sureties stand in the same relation to a principal, they must bear the burdens of this position equally, that J. R. S. C. was not entitled to have more than one-fifth of the amount due to the county on the bond offset as against the sum due on the note.

Same—Equitable Set-Off.

The rule of equitable set-off in such cases, as announced in St. Paul & M. Trust Co. v. Leck, 57 Minn. 87, *held* applicable as to this one-fifth.

Petition in the district court for Le Sueur county in the matter of the assignment of Edson R. Smith and Rollin E. Smith, partners as E. R. Smith & Co., insolvents. John McKasy, assignee of the insolvents, interposed an answer. From an order, Cadwell, J., in part granting and in part denying the relief demanded, both the petitioners and the assignee appealed. Modified.

[1] Reported in 68 N. W. 76.

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O. J. Parker, and *Warner, Richardson & Lawrence*, for petitioners.

Thos. Hessian, for assignee.

COLLINS, J. Edson R. and Rollin E. Smith had for some time prior to July 8, 1893, been co-partners in business in Le Sueur county, in this state, under the firm name of E. R. Smith & Co., keeping and conducting a bank of deposit generally known as the "Bank of Le Sueur." They had previously executed and delivered a bond to the county, which bond had been duly approved, and said firm had been duly designated as a depositary of county funds, as provided by G. S. 1894, § 729 et seq. The Smiths were the principal obligors on this bond, which was a joint and several obligation; and these petitioners, J. R. S. Cosgrove and J. A. Cosgrove, with three other persons, were sureties. On said day there was due from the firm to the county the sum of $4,180.09 on account of deposits theretofore made, and, being then insolvent, said co-partners duly made an assignment, in accordance with the laws of this state, and for the benefit of all of their creditors, of all of their firm and individual property not exempt from seizure and sale under execution.

Before said assignment, June 1, 1893, said J. R. S. and J. A. Cosgrove executed and delivered their promissory note, payable to the order of said E. R. Smith & Co., for the sum of $5,500, payable December 1, 1893, with interest, which note went into the hands of the assignee of said insolvents, as a part of the assets of their estate. September 8, 1893, the petitioners, as sureties upon the bond, paid to the county treasurer the sum of $2,090.05, and other sureties then and there paid the residue of the amount due to the county. They then petitioned the district court to adjudge that the amount so paid by them on account of the bond be declared a valid set-off as against the note, and to direct the assignee to surrender up the note on being paid the balance found due thereon.

Upon an answer made by the assignee, a trial was had, and the court found the facts as before stated. It also found that the note was given for money loaned by Smith & Co. to J. R. S. Cosgrove, that said J. A. Cosgrove signed the note as surety only, and that the relation still existing between the makers of the note was that of principal and surety. As conclusions of law, the court adjudged that J. R.

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S. Cosgrove was entitled to have the sum of $1,045.03, paid by him to the county, applied upon the note as a payment,—the assignee being ordered to so apply that sum,—and that J. A. Cosgrove was not entitled to have any amount whatsoever applied. Both parties appealed,—the Cosgroves, from that part of the order which denied the right of set-off to J. A. Cosgrove, the surety upon the note as well as upon the bond, and the assignee, from that part which ordered the application of the amount paid by J. R. S. Cosgrove, principal upon the note and surety upon the bond. Both appeals were argued and submitted together.

The court below was clearly right in holding that the principal debtor upon the note was entitled to an offset, but it was in error when it ordered the same to the amount of $1,045.03, which was one-fourth of the amount due to the county. There was merely an allegation in the petition that the Cosgroves had paid the sum of $2,090.05, or one-half of the amount due on the face of the bond when the assignment was made, instead of two-fifths, the share they should have paid. The rule is that, where two or more sureties stand in the same relation to a principal, they must bear the burdens of the position equally. There were five sureties, and if there was equality of payment, as there should have been, each of the Cosgroves would have paid one-fifth of the debt, or $836.02. In no event would J. R. S. Cosgrove be entitled to offset more than the amount, prima facie, of his share of the sum due upon the bond, without some further allegation in his petition explanatory, and showing the necessity of such payment; for instance, the insolvency of another surety.

We have stated that the court was right in holding that the petitioner last mentioned was entitled to an offset. The case of St. Paul & M. Trust Co. v. Leck, 57 Minn. 87, 58 N. W. 826, is authority upon this point. The later cases cited by counsel for the assignee—Northern Trust Co. v. Healy, 61 Minn. 230, 63 N. W. 625, and Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909—have no bearing on the claim of offset made by J. R. S. Cosgrove.

And the court was also right when it held that J. A. Cosgrove was not entitled to offset any part of the amount paid by him as a surety upon the bond, as against the note, for the reason that it was not his note. He was not the principal debtor, but a surety only, and the doctrine of equitable set-off, invoked and relied on by him, cannot be

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extended so far as to allow a surety for a debt due to an assignee in insolvency to offset, as against it, the amount of an obligation which he has been obliged to pay as a surety for the assignor. The latter is, in every respect, a debt due to the surety from the estate; but the former is not, strictly speaking, or for the purpose of invoking the equitable powers of the court, a debt due from the surety. It is in fact the debt of his principal, J. R. S. Cosgrove. A surety cannot be allowed to have reimbursement for the loss he sustained as a surety on the bond by offsetting the amount of his loss as against a debt actually due from J. R. S. Cosgrove.

The order appealed from must be modified so as to reduce the amount of offset allowed to $836.02. In all other respects it is affirmed.

GEORGE PFEFFERKORN and Another v. RUFUS C. HAYWOOD and Another.[1]

July 8, 1896.

Nos. 9887—(158).

Action on Joint Obligation—Amendment of Complaint after Judgment against One Defendant—Alleging Obligation as Joint and Several.

Where a cause of action is stated in the complaint as upon a joint debt or obligation, and a judgment for want of answer has been entered against one of the defendants, the district court, upon due application, and in the proper exercise of its discretion, has the right or power to allow, as against another defendant, an amendment to the complaint whereby the cause of action is alleged to be upon a joint and several debt or obligation.

Action in the district court for Hennepin county. Judgment was entered for want of answer against defendant Boshart, and the action came on for trial before Jamison, J., who granted plaintiffs' motion to amend the complaint as stated in the opinion. Thereafter the case was tried before Russell, J., who ordered judgment against defendant

[1] Reported in 68 N. W. 68.

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Haywood for $1475 and interest. From an order denying a motion for a new trial, defendant Haywood appealed. Affirmed.

Gilfillan, Willard & Willard, for appellant.

Isaac A. Barnes, for respondents.

COLLINS, J.[2] Plaintiffs, co-partners, brought this action to recover upon two promissory notes executed and delivered by defendants. Setting forth two separate causes of action in their complaint, they declared upon each note as the joint promise of these defendants. Boshart failed to answer, but defendant Haywood answered, as to the first cause of action, alleging the making of an agreement between plaintiffs and himself, whereby he had been discharged and released from all liability on the note mentioned therein; and, as to the second cause of action, that he had made a partial payment thereon, not acknowledged or admitted in the complaint. Plaintiffs' attorney then entered judgment for want of an answer against defendant Boshart for the full amount due, whereupon counsel for defendant Haywood served a supplemental answer, alleging, in bar of further proceedings, that such judgment had been entered, and without his knowledge or consent. When the cause came on for trial they moved for judgment on the pleadings, invoking the rule of the common law that a judgment entered against one or more of a number of joint debtors operates as a merger of the cause of action, and discharges the balance of the debtors; while plaintiffs, producing joint and several notes, moved for leave to amend the complaint in accordance with this fact. The amendment was allowed, and upon its findings the court ordered judgment for plaintiffs. The appeal is by defendant Haywood from an order denying his motion for a new trial.

We have recently had occasion in the case of Davison v. Harmon, supra, page 402, 67 N. W. 1015, to consider various provisions of our statutes which it was claimed had modified the common-law doctrine before mentioned. Our conclusion was that no change had been made by statute, and that when a plaintiff, in an action brought against joint debtors upon a joint debt or obligation, elects to enter judgment against a defendant who is in default for want of answer, the judgment operates as a bar to subsequent proceedings against

[2] Mitchell, J., took no part.

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other debtors, because the debt or obligation is merged in such judgment. The common-law rule upon the subject prevails in this state, so that, if plaintiffs' causes of action had actually rested upon defendants' joint obligations, the case would be governed by that of Davison v. Harmon, supra, and the court below would have erred when refusing to grant the motion for a new trial. But the facts are that the notes were the defendants' joint and several promises to pay, and upon application the complaint was amended so as to conform to the facts. The result here depends, therefore, upon the right or power of the court below to allow the amendment whereby, after judgment had been entered against Boshart, the causes of action set forth in the complaint as upon joint promissory notes were changed so as to be predicated upon joint and several promissory notes.

As has often been stated when G. S. 1894, § 5266, has been under consideration, the power of the district court to allow amendments of pleadings is very great. It must exercise its discretion in view of the circumstances of each particular case, and, as a consequence, no fixed rule can be stated by which the propriety of allowing amendments can be determined. If in such matters it acts within the limits of its discretion, its action will not be reviewed, and its propriety and expediency considered. And amendments in furtherance of justice are allowable after judgment as well as before. And by section 5269 it is expressly provided that at every stage of an action the court shall disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. The amendment was unquestionably in furtherance of justice, and certainly it did not affect any substantial right held by defendant Haywood. The court, when allowing it, did not abuse its discretion, although it relieved the plaintiffs' counsel from the consequences of somewhat careless pleading, and held Haywood to a liability from which he was escaping on a mere technicality. The claim that from the testimony it appeared that an agreement was made which released and discharged Haywood from liability on the note mentioned in the first cause of action, is without merit.

Order affirmed.

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CARTER, RITTENBERG & HAINLIN COMPANY v. C. D. HAZZARD.[1]

July 8, 1896.

Nos. 9970—(202).

Subscription to Corporate Stock—Acceptance.

An offer or subscription "to take" shares in a corporation yet to be formed must not only be made, but it must also be accepted. As between the corporation and the subscriber, the equities or rights of corporate creditors not having intervened, such an offer cannot be held in abeyance at the will of other subscribers, who have arrogated to themselves the right to organize the corporation, without regard to the conditions fastened upon the subscription contract, to the exclusion of others equally interested.

Same—Release by Delay.

Held, on the undisputed facts in this case, which was brought to enforce payment of the amount of defendant's subscription for preferred stock, that he had been released by reason of delay on the part of the corporation to comply with the condition of his subscription, and by the failure of the corporation to put itself in position to compel him to take and pay for his shares within a reasonable time.

Appeal by defendant from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial. Reversed.

Booth & Douglas, for appellant.

A subscription to the stock of a corporation to be organized is not binding if it is already formed. Indianapolis F. & M. Co. v. Herkimer, 46 Ind. 142; People's Ferry Co. v. Balch, 8 Gray, 303. All conditions precedent of a subscription agreement should be strictly complied with. Morawetz, Corp. § 52; Beach, Pr. Corp. §§ 63, 532, 534, 106, 107; Goff v. Winchester College, 6 Bush (Ky.) 443; 1 Cook, Stock. & Stockh. § 186, and notes; Dorris v. Sweeney, 60 N. Y. 463; Norwich Lock Mnfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 739, 17 S. E. 305. A subscriber to the stock of a corporation to be formed has a right to have a voice in the organization. People's Ferry Co. v. Balch, supra; St. Paul, S. & T. F. R. Co. v. Robbins, 23 Minn. 439. There were such material changes in the circumstances and relations of the

[1] Reported in 68 N. W. 74.

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parties to the subscription agreement between the date of signing and the time when the corporation, if ever, was in a position to issue the stock called for by the agreement, as to release defendant from his subscription. See People's Ferry Co. v. Balch, supra; Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956. There were such variations between the terms of the agreement and the provisions of the articles as to show that the corporation is not the company to whose stock appellant subscribed. 2 Beach, Pr. Corp. §§ 532, 534; Thompson, Corp. §§ 1235, 1322; Masonic Temple Assn. v. Channell, 43 Minn. 353, 45 N. W. 716; Norwich Lock Mnfg. Co. v. Hockaday, supra; Baker v. Fort Worth Board of Trade, 8 Tex. Civ. App. 560, 28 S. W. 403. The organization must be perfected within a reasonable time. 2 Beach, Pr. Corp. § 510, and note 3; People's Ferry Co. v. Balch, supra. Plaintiff did not perfect its organization within a reasonable time. Roberts v. Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680; Cochran v. Toher, 14 Minn. 293 (385); Derosia v. Winona & St. P. R. Co., 18 Minn. 119 (133); Pinney v. First Div. St. Paul & Pac. R. Co., 19 Minn. 211 (251).

Jayne & Morrison, for respondent.

Unless time is the essence of a subscription contract and a particular time was stated therein, it makes no difference when the incorporation is completed unless there is evidence that the corporation has totally abandoned the enterprise. Pittsburg & C. R. R. Co. v. Beyers, 32 Pa. St. 22, 72 Am. Dec. 770. It was only a year and a half between the filing of the articles and the filing of the proof of publication, and this was not an unreasonable time. Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 1 N. W. 827; McMillan v. Maysville & L. R. R., 15 B. Mon. 218, 61 Am. Dec. 181. Even though there was no legal corporation, plaintiff would have the right to recover. Eaton v. Aspinwall, 19 N. Y. 119, 121; Dutchess Cotton Manufactory v. Davis, 7 Am. Dec. 459; Sampson v. Bowdoinham Mill Co., 36 Me. 78; 2 Thompson, Corp. § 1846. By pleading a general denial, defendant admits plaintiff's legal capacity to sue, and consequently cannot question the legal organization or object that there was unreasonable delay in perfecting it. Pullman v. Upton, 96 U. S. 328; Society for Propagation of Gospel v. Town of Pawlet, 4 Pet. 480; 2 Thompson, Corp. § 1848. Irregularities in the organization of a cor-

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poration are no defense to a suit for subscription to stock. 2 Thompson, Corp. §§ 1849–1851, and cases cited. This is especially true on the ground of estoppel, where the rights of the creditors have intervened. Nat. Commercial Bank v. McDonnell, 92 Ala. 387, 9 South. 149. Irregularities in the manner in which the directors or the majority of the stockholders have exercised the powers of the corporation, such as irregularities in the adoption of by-laws or in the election of officers, are not defenses to a subscription for stock. Ginrich v. Patrons' Mill Co., 21 Kan. 61; Chandler v. Northern Cross R. Co., 18 Ill. 190; Whittington v. Farmers' Bank, 5 Har. & J. (Md.) 489. See Johnson v. Crawfordsville R. Co., 11 Ind. 280. The presumption of law is that acts of directors in directors' meetings are legal and cover necessary legal points. Sargent v. Webster, 46 Am. Dec. 743; Lexington v. Headley, 5 Bush (Ky.) 508; Commonwealth v. Woelper, 3 Serg. & R. 28; 3 Thompson, Corp. § 3927, 8 Am. Dec. 628; Society of Middlesex v. Davis, 3 Metc. (Mass.) 133. See Samuel v. Holladay, 1 Woolw. 400, Fed. Cas. No. 12,288. Mere irregularities in the corporation's organization will not release a subscriber. 2 Thompson, Corp. § 1848, and cases cited.

COLLINS, J. This was an action to recover the sum of $3,000, with interest, on account of a subscription for 30 shares of plaintiff's corporate stock. The cause was tried by the court, and on its findings judgment was ordered for plaintiff. Defendant appeals from an order refusing a new trial.

A number of the specifications of error relate to the rulings upon the admission of evidence, while others question certain findings of fact and conclusions of law.

It appears that three persons, Carter, Rittenberg, and Hainlin, named in the writing hereinafter referred to as parties of the first part, and the "Minneapolis Business Union," named as party of the second part, desiring to organize a manufacturing and jobbing corporation, caused a writing to be prepared which bore date August 5, 1892, in which was stated the object, as well as certain conditions concerning the corporate stock, which was fixed at $100,000. The par value of each share was to be $100, 3,000 thereof to be preferred stock with various advantages, and the balance of 7,000 shares to be common stock. Of the common stock the parties of the first

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part were to subscribe for 2,000 shares, and pay in its par value, $20,000. The party of the second part was to obtain subscriptions for all of the preferred stock, if possible. Whenever common stock of the par value of $20,000 and preferred stock of the value of $25,000 was subscribed for, the corporation was to be organized, under the laws of this state, for the purposes before mentioned. There were other provisions in this writing relating to the rights and powers of the holders of the preferred stock, the right of the holders of the common stock to purchase preferred stock, the salaries of the parties of the first part as employés of the corporation when it should be organized, and other matters of little consequence here, except as they clearly indicate that the management of the concern was to be controlled by the holders of the preferred stock. Subscriptions for the shares last mentioned were to be made subject to the conditions of the writing. Hainlin, for himself and as the attorney in fact for Rittenberg and Carter, subscribed for $20,000 of the common stock in accordance with their agreement. Appended to this writing was a subscription agreement whereby defendant and other parties agreed "to take" the amount of preferred stock set opposite their respective names, the total subscription being for shares of the par value of $27,500, to be paid for as called by the board of directors when the company should be organized. It was upon this subscription that this action was based.

The court below found that defendant signed, or subscribed for his shares, on or about October 15, 1892, the exact day not being fixed by the witnesses. It also found that the corporation was organized some time afterwards under the laws of this state, but it found that the articles of incorporation were filed in the office of the proper register of deeds September 28, and in the office of the secretary of state September 29, 1892, and that the affidavit of the publication of plaintiff's articles was not filed in the office last mentioned until June 13, 1894. It also found that defendant had notice of calls for the payment of his stock subscription early in 1893. There was no finding that defendant ever had notice of any of the meetings of plaintiff's board of directors or of its stockholders, or that he knew of its organization, or that it had commenced business.

As before stated, several of the findings of fact have been challenged as unsupported by the evidence, while it is asserted that the

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conclusions of law are not justified by the facts as found. We do not propose to refer to the sufficiency of the evidence, except in a general way, because, from what seems to be undisputed, the action cannot be maintained.

The articles of incorporation executed by Carter, Rittenberg, and Hainlin, subscribers of common stock of the value of $20,000, and by five other persons, subscribers to the preferred stock, purport to have been signed August 13, 1892. A number of these incorporators acknowledged the execution of these articles on that day, and the remainder on September 28, 1892. The affidavit of publication of the articles was not made by the printer until June 13, 1894, almost two years later, and, as before stated, was filed on that day. In view of these facts, it would seem difficult to support the finding that the corporation was organized after defendant subscribed for his shares, for it would appear, almost conclusively, that, instead of subscribing for shares in a corporation to be thereafter formed, as it was recited and stated in the writing to which his subscription was attached, he was actually induced to subscribe for stock shares in a corporation already organized. Or, to put it in another way, the corporation bringing this action had already been formed when defendant agreed to take stock in one yet to be formed. But this is not very material.

Defendant agreed to take preferred stock issued in accordance with the stated conditions, and with certain advantages over the common stock. A majority of the board of directors were to be chosen from among those who held preferred stock, and in various ways was the preferred stock to have the advantage. It was to be preferred stock in fact as well as in name The articles were silent as to classes of stock, and consequently no provision was made for two classes, one known as preferred, and the other as common. Nor was there any provision as to the selection of a majority of the board of directors from the holders of the preferred stock, one of the conditions under which defendant subscribed, while as a matter of fact, of the first board, seven in number, and named in the articles, at least three members were holders of common stock, two had subscribed for preferred stock, and, so far as appears from the record, two were not holders, nor had they subscribed for any stock. The corporation, so far as appeared from its articles of incorporation, was in no condition to comply with the terms of the writing under which defend-

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ant subscribed, and hence could not enforce a payment for shares; and it seems to have remained in this condition until January 4, 1895, nearly two and a half years, when by-laws were adopted by the board of directors for the government of the corporation in which are found provisions relative to the issuance of preferred and common stock, the former having the advantages and preferences specified in the writing of date August 5, 1892. There was also a provision in these by-laws for the election of a majority of the board of directors from the holders of preferred stock.

It will be seen, from this statement, that if the plaintiff was not incorporated until after defendant's subscription was made, it was in no position to issue to him the preferred stock he subscribed for, or to compel him to take and pay for it until after the expiration of more than two years from the date of his subscription, although it was actually engaged in business, as was shown on the trial, from about October 5, 1892, at which time its board of directors voted to lease a building for its use. In November of the same year its vice president purchased goods upon credit valued at $30,000, and all calls for payment on account of unpaid subscriptions were made prior to March 20, 1893. From the records of the stockholders' and directors' meetings it appears that no action was taken towards enforcing the payment of the amount of defendant's subscription until March 16, 1893, at which time plaintiff was not in position to issue preferred stock, when it was voted to take such steps as were necessary to compel payment. But at a directors' meeting held April 3, 1895, it was formally resolved to sell elsewhere the shares defendant had agreed to take. A certificate of stock was issued, tendered, and refused by him in February, 1895, and this action was brought in October of the same year.

The paramount question arising from these facts, and the one which we shall make controlling, is whether the plaintiff put itself in position, within a reasonable time, to issue the shares of preferred stock subscribed for, and to compel defendant to take and pay for the same; and if, from the facts here, which are undisputed, the court should have held, as a matter of law, that the delay on the part of the corporation to organize in the manner agreed upon, and to comply with the conditions under which defendant subscribed, was unreasonable, he was released from his subscription.

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Of course, what might be a reasonable or unreasonable time for compliance with conditions found in a subscription agreement must be determined from the facts in each case, and in this connection it is to be noticed that it is nowhere claimed that by any act of defendant has he waived this defense, or that he has estopped himself in any way from asserting that his conditional subscription was a mere offer which was not accepted. An offer "to take" shares in a corporation yet to be formed must not only be made, but it must also be accepted. Such an offer cannot be held in abeyance at the will or other subscribers, who have arrogated to themselves the right to organize the corporation, without regard to the conditions fastened upon the subscription contract, to the exclusion of others equally interested. Whether the offer is or is not accepted, and the conditions under which it was made complied with, cannot be made to depend on the final determination of those who take active part in an organization, in which other subscribers are not given an opportunity to participate. If this could be permitted, a few subscribers could organize to suit themselves, without notice to others, conduct the corporate business long enough to discover whether it was to be a success or a failure, and then determine what should be done with the shares subscribed for by persons who had theretofore been deprived of all voice in the conduct of corporate affairs.

The case at bar fairly illustrates the injustice which might follow if such were the law. The plaintiff was organized without any effort to comply with the conditions in respect to preferring $30,000 of the stock, and in utter disregard of the stipulation that a majority of the board of directors should be selected from the holders of this stock, and without notice to defendant or his knowledge, so far as shown by the record. It immediately commenced business, and within 60 days had incurred a liability for goods purchased of a value, almost, of one-third of its capital. The shareholders wholly ignored defendant and his conditional subscription for over two years, although actually engaged in business, and then for the first time put the corporation in position to demand payment from him. If this can be done, and defendant be compelled to respond, those who are responsible for the delay have been given an opportunity to release him if the business proved profitable and the shares a paying investment, and to hold him if losses were sustained and the shares became

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valueless. In a case where the rights of creditors are not involved, as in this, we have no hesitation in saying that such an opportunity ought not to be given, and that, upon the facts now before us, plaintiff cannot be permitted to recover. It is not a case where the subscriber, having taken the chances of large gains, has also taken the risk of total loss, and the hardship upon him is not equal to the equities and rights of corporate creditors. In such cases the courts have almost uniformly discountenanced defenses made by subscribers, and have rigidly enforced their liability. We are not placing ourselves in opposition to that wholesome doctrine.

On the facts here we hold that defendant was released by the delay to comply with the conditions of his subscription and the failure of the corporation to put itself in position to compel him to take and pay for his shares within a reasonable time.

Order reversed.

FENDALL G. WINSTON v. F. B. HART and Wife.[1]

July 8, 1896.

Nos. 10,009—(239).

Pledge—Construction of Contract—Redemption.

Held, upon the findings of fact in this action, which was brought to obtain a judgment directing the sale of certain securities pledged for the payment of a debt, that the trial court erred in its conclusions of law.

Appeal by plaintiff from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial. Reversed.

Van Fossen & Frost, for appellant.

F. B. Hart, for respondents.

COLLINS, J.[2] It seems necessary to state the facts in this case as found by the court with some particularity.

Prior to August 20, 1891, plaintiff brought an action upon a past-due interest-bearing promissory note for $2,154.49, made and deliv-

[1] Reported in 68 N. W. 72.

[2] Mitchell, J., took no part.

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ered by defendant F. B. Hart, payable to plaintiff's order. On that day, to avoid an entry of judgment in said action, to obtain an extension of time, and to secure the debt, defendant Imogene L. Hart duly assigned and transferred her right, title, and interest in three separate life insurance policies which had theretofore been issued by a certain life insurance company on the life of said F. B. Hart, for the benefit of said Imogene L. Hart, his wife. It was mutually agreed between the parties that time for the payment of said note should be extended to October 1, 1891, and plaintiff gave to Imogene L. Hart an instrument in writing stating that fact, that the policies were held as security for the amount due on the note, that plaintiff would not resort to the security until after 60 days' notice to Imogene L. Hart of the default of F. B. Hart, and, further, that the former might redeem the policies by paying the cash surrender value as estimated by the insurance company. The note was not paid October 1, and on October 12 another note, for $2,500, payable to plaintiff's order July 1, 1892, without interest, was executed and delivered, to secure which the defendants executed and delivered a mortgage upon real estate, the separate property of Mrs. Hart. This note and mortgage were given as collateral security for the payment of the note first mentioned, which was not surrendered, but, as part of the consideration for the collateral security, the time of payment was extended to the due day of the collateral note. The action before mentioned was dismissed. May 11, 1894, plaintiff foreclosed the real-estate mortgage, and from the proceeds of the foreclosure sale received the sum of $2,777.50, over and above costs and expenses, all of which was indorsed and credited upon the original note. This amount was largely in excess of the cash surrender value of the policies according to the estimate made by the insurance company. An action was then commenced by plaintiff against defendant F. B. Hart to recover the balance due upon the note first mentioned, and thereafter judgment was duly entered in said action against said defendant for the balance, $328.10, no part of which has been paid.

This action was commenced to obtain a judgment, against said defendants, F. B. and Imogene L. Hart, ordering a sale of said insurance policies that the proceeds might be applied in payment of this judgment. Previous to the bringing of this action Mrs. Hart demanded that the policies be surrendered and reassigned to her,

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while plaintiff gave her due notice of his intention to resort to the same for the purpose of liquidating the balance due him from her husband. On these findings of fact the court below ordered judgment that plaintiff redeliver and reassign the policies to defendant Imogene L. Hart, and that defendants recover their costs and disbursements. Plaintiff's appeal is from an order denying a new trial.

The court below was clearly wrong in its conclusions of law, for, on the findings of fact, plaintiff was entitled to judgment as demanded in his complaint. The trial court seems to have been of the opinion, as we gather from what was said at the close of the testimony, that because the plaintiff agreed, when the policies were assigned to him by Mrs. Hart, that she might redeem them by paying their surrender value, the foreclosure of the mortgage subsequently given by her upon her separate real estate, and a sale of said estate for more than the surrender value, operated, in the absence of an express agreement to the contrary, as compliance with the provision for redemption. This position is wholly untenable.

Mrs. Hart assigned and transferred the policies to prevent an entry of judgment in the pending action, to obtain further time for payment, and as security for her husband's debt. The consideration was ample, and plaintiff then held the policies as security, subject to the provision for redemption by Mrs. Hart. She never attempted to exercise this right, but later, and without qualification, gave further and other security for another and new consideration. This operated as additional security, but in no manner affected the contract, previously entered into, under which the policies were pledged. Nor was it affected by a sale of the land to satisfy the mortgage for an amount in excess of the surrender value of the policies, for, in making that sale, and appropriating the proceeds, plaintiff did precisely what Mrs. Hart had authorized him to do when she gave the security,—nothing more. She voluntarily made two separate contracts, each based upon a different consideration, for different purposes, and with independent conditions. By its conclusions of law the court permitted her to inject into the last agreement a condition which was never there, namely, that if plaintiff foreclosed the mortgage, and from a sale realized more than the cash surrender value of the policies, he would reassign and return them to Mrs. Hart. That the plaintiff never agreed to accept the mortgage security in

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place of the cash surrender value is evident. The courts have no power to compel him to do so, and the order refusing a new trial must be reversed.

Upon a claim that the conclusions of law were not justified by the findings of fact, counsel for appellant caused a case to be settled in the court below containing all of the evidence. This evidence is in the return on appeal, and occupies 27 pages of the paper book, in disregard of the plain provisions of subdivision 5 of rule 9 of this court. Appellant is not entitled to, and will not be allowed, any disbursements by the clerk for preparing, certifying, or printing the evidence.

The order is reversed, and, when the cause is remanded to the court below, judgment will be entered for plaintiff for the relief demanded in the complaint.

July 17, 1896.

PER CURIAM. Upon reading and filing the application of respondent for a modification of the opinion of this court in this cause, it is ordered that the direction of this court, given in the concluding paragraph of the foregoing opinion, be changed and modified by adding thereto the following words: "Unless, upon a proper showing and motion duly made, the court below orders a new trial of said action."

FINANCE COMPANY OF PENNSYLVANIA v. OLD PITTSBURGH COAL COMPANY.[1]

July 8, 1896.

Nos. 10,024—(277).

Instructions—Sufficiency of Exceptions.

The court below charged the jury as to the law of custom or usage as applicable to the facts in evidence. The only exception taken was "to the explanation and enunciation of the law of custom and the application thereof, as applied to the facts of this case." *Held* too general, and of no avail.

Same—Repetition of Charge.

Held, further, that the trial court did not err when it declined to instruct the jury on the law of custom and usage in the language found in one of plain-

[1] Reported in 68 N. W. 70.

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tiff's requests, because, although in different form, it was a repetition of a part of the general charge.

Purchase by Sales-Agent—Liability of Principal—Duty to Exercise Diligence.

The law does not impose upon a party who produces an article for sale the duty of exercising diligence and prudence that he may seasonably discover that an agent or clerk specially employed by him to sell his wares, and clothed with no other authority, apparent or real, is so far exceeding his authority to sell as to engage in purchasing from rival concerns, on his employer's account, the very article the latter is producing and selling.

Appeal by plaintiff from an order of the district court for Hennepin county, Smith, J., denying a motion for a new trial, after a verdict in favor of defendant. Affirmed.

Boardman & Boutelle, for appellant.

Young & Fish, for respondent.

COLLINS, J. This action was brought by plaintiff against defendant, both nonresident corporations, and known to the trade as "producing companies," to recover the value of certain coal which had been delivered to a "sales-agent," that is: an agent selling on commission, and upon his order. The only question litigated before the jury resolved itself into two inquiries: First, is there a custom arising from usage existing in and peculiar to the coal trade, whereby one who is a sales-agent becomes in fact an agent with power to bind his principal in the purchase of coal from other dealers? If not, second, was defendant informed that this sales-agent was ordering and receiving the coal in its name, and on its credit, assuming to have authority so to do, and did defendant, having this information, acquiesce therein. On these issues it will be seen that the case was a simple one. But plaintiff's counsel saw fit to present to the learned trial court 15 requests to charge, many of which lacked conciseness, and would have tended to confuse, instead of to enlighten, the jury. The court declined to give these requests as submitted, and charged the jury upon the points involved in its own language.

In December, 1894, one Tucker entered into defendant's employ at Minneapolis as a sales-agent, or an agent to sell its coal on commission. The authority actually conferred upon him was to solicit orders for coal, forward them to defendant's Chicago office, where they were approved, and ordered to be filled from the home station, the

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coal being sent direct to the purchaser, and pay therefor being collected by the person in charge of the Chicago office. Tucker's commissions were also sent to him from this office. Any further or other authority possessed by Tucker would have to be inferred or implied from the fact that he was actually a sales-agent; that defendant knew that he had opened an office at which a sign bearing defendant's name was displayed, together with another sign, on which was the name of an oil company for which Tucker was selling goods on commission, and also knew that he kept books of account and a bookkeeper, and was using defendant's letter heads and cards, furnished from the Chicago office, on which his name appeared as sales-agent. The coal over which the ligitation arose was sold and delivered within four months after Tucker entered into defendant's employ.

It appeared from the testimony that Tucker called at plaintiff's office in Minneapolis, presented one of defendant's cards with his name printed thereon as sales-agent, obtained prices, and soon afterwards commenced to order coal. There was no claim on the trial that, in the absence of a usage or custom, the compound word "sales-agent" would have any more significance, or mean anything more, than the word "salesman." But plaintiff's contention was that by a custom peculiar to the coal trade a practice had grown up, and by usage the power had been given to sales-agents, to order and purchase coal from other concerns for and on account of the agent's principal. The claim was that this custom was so general and uniform, and the usage so long established and so well known, as to have acquired the force of law. The testimony of quite a number of witnesses was introduced on this branch of the case; by plaintiff to show that this custom and practice was uniform in the coal trade, had existed and had been acted on for a long time, and was generally recognized, and by defendant to show that there was no such custom, and never had been. On the evidence the existence or nonexistence of this custom was, we assume, for the jury, and, if so, a finding either way could not be disturbed. The court below submitted the question of the existence of this custom to the extent claimed by appellant's counsel in clear and comprehensive language, and no doubt the law applicable to the evidence on this point was well understood by the jury; and the only exception taken was "to the explanation and enunciation of the law of custom and the application thereof, as

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applied to the facts of this case." This exception is useless, because too general. We have held that an exception "to each and every part of the charge" is insufficient, and the one now before us is open to greater criticism than that.

But counsel, by one of their assignments, claim that the court erred when it declined to give their fourteenth request in the exact language in which it was written, even if the court had already correctly stated the law upon the subject of custom and usage. Admitting that the propositions contained in the request were correct in the abstract, it is obvious that it was nothing but a repetition, in a little different form, of the rule for ascertaining whether a particular usage or custom has acquired the force of law, and of the further rule that, if it has, persons dealing with each other conformably to such established custom, and in reliance upon its existence, will be bound thereby. The court had already charged the jury that plaintiff claimed that the title or designation "sales-agent" gave to Tucker general authority not only to sell his principal's coal, but to purchase coal from other parties to a reasonable extent, and was so treated by custom and usage among coal dealers; that the claim that Tucker was acting within the scope or apparent scope of his authority rested upon the fact that such custom or usage had been established by the evidence; and if they found, under the rules already stated, that such was the custom, they could say that Tucker was acting within the apparent scope of his authority, and his principal would be bound to pay plaintiff for its coal. This really covered all that was contained in the fourteenth request, and, had counsel's language been adopted, it would have been simply a change in the form of the statement. We do not deem it necessary to discuss further the charge on this branch of the case, or the requests made by counsel and rejected by the trial judge.

From the evidence it appeared that the president of defendant corporation visited Minneapolis January 15 and 16, 1895, and was in Tucker's office. The first sale of coal by plaintiff on Tucker's order had been made a few days before, and the party who was then bookkeeper for the latter testified that the president was then shown one of plaintiff's invoices or bills of coal, in which defendant was designated as purchaser. From this plaintiff claimed that defendant had actual knowledge of Tucker's acts, and, not repudiating, had acqui-

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esced therein. This evidence bore upon the second question in litigation before referred to. But the president was also a witness upon the trial, and emphatically denied that such an invoice or bill was shown him, or that he was informed in any way that Tucker was dealing with other parties. The jurors seem to have believed the witness last named, and to have concluded that the ex-bookkeeper was untruthful. It was for the jury to determine between these two men, and the issue arising out of their contradictory testimony was fully presented by the court in its charge.

But counsel seem to have thought that the evidence was ample to support a finding that defendant was liable, because in some manner it had neglected properly to supervise Tucker while he was in Minneapolis, and on this phase of the case submitted eight separate requests to charge. The substance of these reiterations was that, if Tucker was employed as an agent, opened an office, whereon he placed a sign bearing defendant's name, conducted business openly and in the ordinary manner, kept a set of books showing his business transactions, including entries respecting the purchases from plaintiff, and used letter heads bearing defendant's corporate name, with his own as agent, it was defendant's duty to discover what was going on, if it could have been discovered by the use of ordinary diligence and prudence; and that neglect to perform its duty in this respect would amount to what counsel termed "guilty ignorance," equivalent to and the same as actual knowledge of Tucker's acts and a failure to promptly repudiate the same. It was conceded that Tucker was defendant's sales-agent, duly empowered to sell coal upon orders; that he opened an office; that he displayed the sign; that he kept books; that he used the letter heads; so that, if the requests had been given, the jury would have been instructed that, if ordinary diligence and prudence would have disclosed the fact that Tucker was exceeding his authority, was purchasing coal instead of selling, it was defendant's duty to exercise such diligence and prudence, and, failing so to do, it became liable.

We have yet to learn of any rule of law or morals which imposes upon a producing merchant the duty of exercising diligence and prudence to discover that his agent or clerk, specially employed to sell his wares, and clothed with no other authority, apparent or real,—for instance, a salesman or sales-agent for a coal-producing company,—

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is so far exceeding his authority to sell as to engage in purchasing from others on his employers' account the very article the latter is producing and selling. It would be startling should we hold that the many agents scattered through this Western country for the special purpose of selling farm machinery, but having offices, displaying signs, using letter heads, and keeping books of account, as did Tucker, have such authority, and can bind their principals, if they choose to purchase on such principal's credit machinery produced by rival companies, unless such principals exercise ordinary diligence and prudence to discover such unwarranted and unexpected acts. And yet that is the logic of these requests. No such rule ever prevailed, or ever will, for it is radically opposed to the settled principles which govern dealing with agents by third parties. On the question of authority of an agent of a business concern, and how a principal may be bound by the appearance of authority which his negligent conduct of his business permits his agent to have, see Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

Several of the 28 specifications of error are directed to rulings of the court when receiving the testimony. We have examined all, and find no error. Nothing more need be said.

Order affirmed.

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T. H. BENTON CRANE, Administrator, v. JOHN KNAUF and Others.[1]

July 8, 1896.

Nos. 10,031—(200).

Judgment Notwithstanding Verdict—Motion for New Trial.

The rule laid down in Kernan v. St. Paul C. R. Co., 64 Minn. 312, that a party is not entitled to an order for judgment in his favor notwithstanding the verdict, under Laws 1895, c. 320, on a motion for a new trial, unless he has asked for that relief in his moving papers, applied in a case where the motion included as a ground therefor that the verdict was not justified by the evidence, and was contrary to law.

[1] Reported in 68 N. W. 79.

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Same—Appeal.

On appeal from such an order, it is first to be modified, and is then to be considered as an appeal from an order setting aside a verdict and granting a new trial on the ground before stated.

Appeal by defendants Reinhardt and others from an order of the district court for Clay county, Baxter, J. Modified.

C. A. Nye, for appellants.

Houpt & Baxter, for respondent.

COLLINS, J. This is an appeal from an order setting aside a verdict in favor of the defendants (appellants) in an action brought by alleged purchasers in good faith, for value, and before maturity, upon three negotiable promissory notes executed and delivered by the appellants and other persons, and also directing that judgment notwithstanding the verdict be entered in plaintiff's (respondent's) favor. The motion upon which this order was predicated was to set aside the verdict and to grant a new trial on the grounds—First, that the verdict was not justified by the evidence, and was contrary to law; and, second, errors in law occurring at the trial, and duly excepted to. No other relief was asked.

Under the rule laid down in Kernan v. St. Paul C. R. Co., 64 Minn. 312, 67 N. W. 71 (decided since the order appealed from was made), that part of it which directed judgment in plaintiff's favor was unauthorized, and to that extent there must be a modification of the same. This leaves the appeal as from an order setting aside the verdict and granting a new trial on the ground of the insufficiency of the evidence to support the verdict. We are not required to cite authority for the well-established rule in this state that if there is not a manifest preponderance of evidence in favor of the verdict an order granting a new trial on such ground will not be reversed, even in cases where there was evidence reasonably tending to sustain the verdict. This rule is specially applicable here, in view of the evidence on which defendants relied to defeat recovery.

In so far as the order directed the entry of judgment in plaintiff's favor, it is modified. In other respects, it stands affirmed, but a new trial must be had.

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GAAR, SCOTT & COMPANY v. WILLIAM J. PATTERSON and Another.[1] 65 449
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July 8, 1896.

Nos. 10,047—(167).

Sale—Breach of Warranty.

Several specifications of error relating to the rulings made on the trial of this action, which was brought upon promissory notes, the defense interposed being based upon a warranty of a threshing machine for which the notes were given, and a breach thereof, considered and disposed of.

Same—Verdict Sustained.

Held, that the evidence was sufficient to sustain a finding that the machine in question was sold to defendants upon a verbal warranty, and that it was sufficient to support the verdict in defendants' favor for damages growing out of a breach of said warranty.

Appeal by plaintiff from an order of the district court for Murray county, P. E. Brown, J., denying a motion for a new trial. Affirmed.

Jay Henry Long and *John M. Rees*, for appellant.

T. J. Knox and *H. C. Grass*, for respondents.

COLLINS, J. This was an action upon three promissory notes executed and delivered by defendants in part payment for a steam threshing machine. The defense set up in the answer was a breach of warranty of the machine, with a large claim for damages said to have been caused by the breach. The verdict was for defendants in a sum exceeding $1,000, and plaintiff appeals from an order denying a new trial.

From the evidence it appears that defendants ordered from the plaintiff corporation, through the agents of the latter at Luverne, Minnesota, a threshing machine of a certain description, to be loaded on the cars at Richmond, Indiana, on or before July 25, 1893, and shipped to Luverne. This order, partly printed and partly written, was in the usual form of such instruments, containing the customary warranty, with certain conditions to be complied with by defendants should the machine fail to fulfill the warranty. It also contained a condition

[1] Reported in 68 N. W. 69.

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that it was not to be binding on plaintiff until accepted by it, and entered upon the books of the corporation. As part payment for the machine, defendants, when giving the order, turned over and delivered to plaintiff an old machine, at an agreed value, which the latter immediately sold and disposed of. About the time the new machine should have reached Luverne, defendants went there to receive it. It had not arrived, and while waiting, the latter claim, they were informed that plaintiff would not or could not furnish the machine ordered. It is their claim that it was then agreed that the contract evidenced by the order should be rescinded and abandoned, and that, upon the same terms as to price and dates of payment, defendants should take a machine then on its way to Luverne, which reached there soon afterwards.

It was also testified to by defendants that, in consideration of their agreement to take another machine, the plaintiff, through its agents, verbally warranted it to be made of good materials, and that it would do good and satisfactory work; and they further claimed that no conditions of the kind we have mentioned, as contained in the order, were imposed upon them, should the machine in question fail to comply with the terms of the verbal warranty. As might be expected, plaintiff contended that there was no rescission or abandonment of the written contract, but that in filling the order it was not strictly complied with; that, in some nonessential particulars, changes were made which were satisfactory to defendants, and that the machine delivered was upon the order, and upon no other contract; that there was no warranty of any kind, except that found in the order itself; and that the machine was delivered and the notes given in accordance and as a compliance with the provisions of the order, not otherwise. This question, then, was for the jury, and while, from the undisputed evidence, it would appear that there was no material difference between the machine ordered and the one received, there was testimony tending to support the defendants' contention that the contract embraced in the order was abandoned when plaintiff's agents informed defendants that their order would not or could not be filled in strict accordance with its terms. In passing, we may here say that there was no proof that plaintiff ever accepted the order, and if it depends on the instrument itself, introduced in evidence, it is quite clear that it was not accepted in form.

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Counsel for plaintiff urge that if there was evidence to justify a finding that the contract contained in the written order was abandoned, and another machine purchased under a verbal warranty, it was incumbent upon defendants to notify plaintiff that the terms of the warranty were not fulfilled, and to offer to return the machine before a cause of action could arise for breach of the warranty. But, if the machine was purchased as claimed by defendants, the verbal warranty was absolute. It was unconditional, and defendants' right to rely upon it did not depend upon an agreement to notify plaintiff, that it might have an opportunity to remedy the defects; or upon an offer to return. The case of Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227, cited by counsel, is not at all in point. For a breach of the warranty, defendants had a right of action, and, when sued upon the notes, could enforce their right by counterclaiming the amount of their damages. The testimony of one of the defendants, relied upon by counsel, shows, at most, that they had the privilege of returning the machine if it did not fill the warranty, but this remedy was not exclusive. They might retain the machine, and have their action for the breach. Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; Fitzpatrick v. D. M. Osborne & Co., 50 Minn. 261, 52 N. W. 861. Again, a part of the consideration for the new was the old machine, which had been sold and disposed of by plaintiff long before the new machine was delivered. From this fact it is apparent that the parties did not intend that rescission of the contract of sale should be the exclusive remedy in case of a breach of warranty. The sale could not be rescinded, for plaintiff could not restore the old machine to defendants' possession.

Counsel for plaintiff make several other points in their brief in support of their claim that there should be a new trial. They contend that the written instrument was an unconditional sale of the machine therein described, that there was no consideration for the oral agreement said to have been made and that it was of no effect, because agents with power to sell have no authority to rescind, or to consent to an abandonment of, a contract already made with their principals. These claims are all answered by a brief recapitulation of the facts. Defendants gave an order for a threshing machine of a certain description, turning in and delivering as part payment an old machine. It was expressly stipulated in the order that plaintiff, to whom the or-

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der was given, should not be bound by its terms until it was accepted in a certain manner. It was not accepted in form, and from the evidence the jury was justified in finding that plaintiff expressly declined to accept it, or to ship the only machine defendants had ordered, or were bound to receive. The evidence also tended to show that, when advised of plaintiff's declination to fill the order as it was given, a new agreement was entered into, under which defendants received the machine for which they gave the notes in question. Included in this agreement or new bargain was a verbal warranty, and defendants claim that there was a breach of this warranty. On these questions of fact plaintiff is concluded by the verdict, and nothing further need be said.

Counsel also make the point that there was no testimony offered tending to show that threshing machines are usually sold with a warranty; claiming that, because of this, defendants failed to establish a defense. If by this contention counsel mean that it was necessary for defendants to show that threshing machines are usually sold with a warranty, before it could be presumed that plaintiff's agents were authorized to warrant the one over which this controversy has arisen, attention is called to McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675; Deering v. Thom, 29 Minn. 120, 12 N. W. 350; Boynton Furnace Co. v. Clark, 42 Minn. 335, 339, 44 N. W. 121; C. Aultman & Co. v. Falkum, 51 Minn. 562, 53 N. W. 875.

Under one of their assignments of error, counsel have raised the claim that the verdict was clearly against the weight of evidence and was the result of passion and prejudice. This same claim was presented and disposed of below on the hearing of the motion for a new trial. As to the amount of the verdict, it may be said that it was strictly within the instructions of the court, to which counsel took no exception, and that it was warranted by the evidence. If the amount was large, counsel for plaintiff must bear in mind that they produced little or no evidence tending to contradict that of defendants as to the agreed price for the old machine delivered to plaintiff, and sold by it, the agreed price being stated to be $900, and no evidence whatsoever upon the question of the real value of the new machine, and, further, that they failed to cross-examine defendants' witnesses who testified that it was worthless. If they chose to let all this testimony as to the price agreed upon for the old machine,

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and that the new was of no value because it would not fill the warranty, go to the jury without contradiction, they are in no position to urge that the amount of damages allowed was excessive.

There are quite a number of assignments of error which we have not referred to. Upon examination we fail to discover that the trial court erred in any of the rulings covered by these assignments, and they need not be specially discussed.

Order affirmed.

STATE ex rel. HARRY GRAHAM v. THOMAS McMAHON, Bailiff.[1]

65 403
69 452

July 8, 1896.

Nos. 10,183—(328).

Boiler Inspectors Act—Exemption of Locomotive Engineers.

G. S. 1894, § 498,—a part of the act of 1889, generally known as the "Boiler Inspectors Act,"—construed. *Held*, under the language used in that section, that locomotive engineers only are exempt from the provision which requires all persons intrusted with the operation of steam boilers or steam machinery to procure a license.

Same—Inspection by Insurance Companies.

Held, further, that steam boilers brought within the exemption provided for in the same section are those which have been inspected by insurance companies duly authorized, and whose business it is to insure steam boilers within this state, which have been inspected and certified as safe by the inspectors of such companies.

Same—Constitution.

None of the provisions of said section 498 render the act of 1889 unconstitutional.

Appeal by respondent from an order of the district court for Ramsey county, Egan, J., ordering discharge of relator on return of a writ of habeas corpus. Reversed.

Relator was detained under a warrant for his arrest issued by the municipal court of the city of St. Paul.

Herman Oppenheim, for appellant.

Weed Munro, for relator.

[1] Reported in 68 N. W. 77.

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COLLINS, J.[2] In this case, which is an appeal by the respondent, under the provisions of Laws 1895, c. 327, from an order discharging the relator in a habeas corpus proceeding, we are required to pass upon the constitutionality of an act of the legislature (Laws 1889, c. 253) generally known as the "Boiler Inspectors Act" (G. S. 1894, §§ 480–494, inclusive).

The claim is made in behalf of the relator (who was arrested upon a warrant issued upon a complaint charging him with having wrongfully and unlawfully operated a steam boiler, and stationary engine attached thereto, without first having obtained a license) that, because of the exemptions provided for in section 493, the act is unequal and partial, and is class legislation, forbidden by the constitution. If the construction placed on the language found in said section, by relator's counsel, is correct, his argument upon the unconstitutionality of the whole act would be unanswerable, but we are of the opinion that this section should not be construed as counsel claims.

Omitting a proviso which is of no consequence here, the section reads as follows:

"Sec. 493. This act shall not apply to railroad locomotives, nor shall engineers employed by railroad companies be required to procure licenses from the state board of inspectors. Nor shall it apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe. * * *."

Briefly stated, the position of counsel is that this section must be construed as exempting, in terms, from the operation of the requirement to obtain licenses, all engineers who may be employed by railroad companies, whether as locomotive engineers, or in operating stationary engines used in office buildings, station houses, grain elevators, pumping stations, and even on wood-sawing machines, and that it must also be construed as exempting from inspection all boilers which may be inspected by insurance companies, and certified to be safe by their inspectors, without regard to the character of insurance business these companies may be engaged in or authorized to do. It is further claimed that the provision respecting boilers inspected by insurance companies is obnoxious to the constitution, be-

[2] Mitchell, J., took no part.

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cause it is an unwarranted and unreasonable delegation of the police power of the state to such companies.

The object of the act of 1889 was to provide for the inspection of steam boilers, and the examination, as to qualifications, of persons intrusted with their management, or with the management of any machinery operated by steam within this state, that its citizens might be protected from the greatly-increasing hazards arising out of defective construction, or want of care and repair, of boilers, as well as unskillfulness and incompetency on the part of the hundreds of persons engaged in handling them and their appliances. It was intended as a police regulation designed to secure public safety; and in view of the universal use of steam in all kinds of manufacturing and mechanical business, and even in farming operations,—small as well as large,—no one should doubt the wisdom of the enactment and enforcement of a reasonable measure in reference to the inspection of such dangerous agencies as steam boilers, and the machinery connected therewith, and the examination, as to their qualifications, of those who are intrusted with their management.

Having in mind the object in view, and the methods to be adopted to accomplish this object, there can be no valid reason why the legislature could not exempt from the operation of the act certain classes of subjects and persons, provided some solid and substantial ground or basis for the exemption actually existed. An exemption of a certain class of boilers, or of persons, not based upon such a difference in the situation or circumstances of the subjects placed in different classes by means of the exemption as suggests the necessity or propriety thereof, could not be sustained. And not only must all persons and subjects brought under the influence of the legislative act be treated alike, under the same conditions, but, in its classification, it must bring within its influence all persons who, and all subjects which, are under the same conditions.

Although counsel for relator has suggested that no apparent reason exists for any discrimination in favor of locomotive boilers or locomotive engineers, or in favor of boilers which are inspected by boiler insurance companies, he does not urge the point. It is evident, however, that the difference in the situation and circumstances of the persons and the boilers placed within the exemption suggested the propriety of the same; for it is a matter of common knowledge

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that locomotives are subjected to frequent—almost continual—inspection, while locomotive engineers must of necessity be well qualified and skillful, and, further, that if the latter fail to exercise a high degree of ability and care they are at once discharged. And it is also known that companies engaged in the business of insuring steam boilers not only inspect before accepting a risk, but also exercise continual supervision over them for their own protection. The contention here is therefore reduced to the question of construction.

1. Was it the manifest intention of the legislature, when using the words, "nor shall engineers employed by railroad companies be required to procure licenses," to exempt locomotive engineers only? If so, the objection to this feature of the section is removed. We are of the opinion that none but locomotive engineers were intended to be exempted. Reference to railroad locomotives, exempting them from inspection, had just been made, and the above-quoted language —following, as it does, immediately—must be construed as applying solely to locomotive engineers. And again, in common phrase, when people speak of an engineer employed by a railroad company, they always refer to locomotive engineers, not to men who may be employed in running stationary engines for the company. Had the words used been "locomotive engineers," there would have been more conciseness of statement, but we are not to discover the legislative intent by determining what language would have best expressed it.

2. The act is not to apply to boilers inspected by insurance companies, and certified by their inspectors to be safe. We are again compelled to ascertain what was intended by the use of this language. It is also a matter of common knowledge that insurance companies are engaged in the business of insuring steam boilers against explosions, and, with this knowledge, it is obvious that the boilers thus brought within the exemption are those which have been inspected by insurance companies duly authorized, and whose business it is to insure steam boilers within this state which have been certified as safe by the inspectors of such companies. There is no ground for saying that this language is capable of being construed as exempting a boiler inspected by a company not engaged in the business of insuring boilers, and for that purpose causing them to be inspected.

There is nothing in the point that there was an unwarranted delegation of the police power of the state when the legislature declared

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that the certificate of the inspector of one of these companies that a boiler was safe should exempt it from the operations of the law.

This disposes of the case, and the result is that the order appealed from is reversed, and judgment will be entered in this court remanding the relator to respondent's custody.

ROCHESTER LODGE NO. 21, ANCIENT FREE & ACCEPTED MASONS v. MICHAEL W. GRAHAM and Others.[1]

July 13, 1896.

Nos. 9897—(194).

Conveyance by Life Tenant and Reversioner—Covenant of Reversioner—Effect on Life Estate.

A. was the owner of a life estate in a city lot, and B. was the owner of the reversion. They were erecting the first and second stories of a building on the lot, and C., under a license from them, was erecting the third story. Thereupon A. and B. joined in a conveyance in fee to C. of such third story. In the conveyance B. covenanted to build and maintain forever the roof of the building, and C. covenanted to pay a perpetual rent of $25 per annum. B. built the roof, and thereafter A. and B. joined in a conveyance in fee of the rest of the premises except the third story to certain of the defendants. In time the roof became decayed, and C. was compelled to erect a new one, and brought this action to have the whole cost of the same declared a lien on the interest of such defendants in the building and lot. A. is still living. *Held*, A. not having joined in the covenant to maintain the roof, the covenant of B. to do so does not run with the life estate of A., or incumber the same, either in law or equity, with the whole burden of maintaining the roof; that such defendants are still enjoying possession under that life estate, and not under the reversion, and, so far as plaintiff's present claim is concerned, it can only compel contribution from such defendants of their equitable share of the cost of maintaining the roof.

Same—Covenants Running with Land.

Distinction noted between a conveyance in fee reserving rent and a lease for life or years, as to covenants running with the land.

Action in the district court for Olmsted county against Michael W. Graham, Edward A. Schwartz, and Anna L. Schwartz, his wife. Rob-

[1] Reported in 68 N. W. 79.

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ert B. Graham and Rebecca N. Graham, his wife, were also joined as defendants, but the summons was not served upon them, nor did they appear. The cause was tried before Gould, J., who ordered judgment in favor of plaintiff. From an order denying a motion for a new trial, defendants Michael W. Graham and Edward A. Schwartz appealed. Reversed.

Chas. C. Willson, for appellants.

R. H. Gove and *Burt W. Eaton*, for respondent.

CANTY, J. The following facts appear from the findings of the court in this action:

On August 15, 1864, Rebecca N. Graham was the owner of a life estate for and during her life in a certain city lot in Rochester, Minnesota, and her husband, Robert B. Graham, was the owner of the reversion. There was then in the course of erection on the lot a brick building, "designed for two stores below with hallway and other rooms on the second floor." On that day the Grahams made a deed conveying to three persons named, "as trustees for Rochester Lodge No. 21, Ancient Free and Accepted Masons, then an unincorporated organized society," "the entire upper or third story of said building, not exceeding 20 feet in height above the bottom of the joists" under the floor of that story; also a certain designated dark room in the second story, with a right of passage down the stairways to the street. At the time of making this deed, the lodge had already, at its own expense, constructed nearly all of said third story except the roof, under a verbal license from the Grahams.

It is further found: "That in and by said deed the said Robert B. Graham (but not his wife) covenanted as follows, among other things, viz.: 'First. That he will build, repair, and maintain forever a good, substantial, and efficient roof and cornice upon said building.' That said deed was made by said grantors to said grantees in trust for the use and benefit of the said Rochester Lodge No. 21, to be used for the purposes and object of said society; and the grantees on their part covenanted therein with the grantors (1) to assume and faithfully execute said trust, subject to the advice and approval of said lodge; (2) to pay an annual rental of $25 on the 1st of January, each and every year; (3) to reconvey to grantors, their heirs or assigns, on request, after ten years, upon certain conditions; and (4) to 'grant and quit-

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claim all the real estate, right and privileges acquired by them under this instrument (subject to the rights, rents, and reservations herein secured to the grantors) unto the said Rochester Lodge No. 21, Ancient Free and Accepted Masons, within one month after said society shall be duly and legally incorporated, and capable of taking and holding title to real estate.'" This deed was recorded. On June 29, 1875,—within one month after the lodge was incorporated,—two of the trustees conveyed to the lodge, and afterwards on August 4, 1875, the other trustee conveyed separately to the lodge. By conveyances from Robert B. and Rebecca N. Graham, subsequent to the one to the three trustees, the defendant Michael W. Graham became the owner of both the life estate and reversion in the north half of the lot and building as to the first and second stories of the building, and the defendant Edward A. Schwartz of the south half thereof.

In the course of time, the roof became leaky and out of repair, and it became necessary to rebuild the same. The defendants, including Robert B. Graham, were notified by the lodge to rebuild it, but neglected to do so. For these reasons the lodge was compelled to and did rebuild the roof at an expense to it of $261, and brought this action against all of the Grahams and Schwartz and wife to have the amount so expended declared a lien on the rest of the premises, and to have the same sold to pay such amount. On the trial before the court without a jury the court ordered judgment as so prayed for, and from an order denying a new trial the owners of the rest of the premises appeal. Other facts will be stated in connection with the discussion of the case.

Rebecca N. Graham is still living, so her life estate is still running. The ten-year option reserved in the deed to the three trustees was never exercised, and therefore it is out of the case. The $25 per year rent reserved to the grantors in that deed was a perpetual rent reserved on a conveyance in fee. Since the statute of quia emptores,[2] the reservation of such a rent does not create between the grantor and grantee any relation of landlord and tenant, give rise to any fealty between them, or give the grantor any tenure or possibility of reverter, but immediately on the delivery of the deed the parties become strangers to each other. 2 Washburn, Real Prop. (5th

[2] 18 Edward I. c. 1.

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Ed.) 284–298; notes to Dumpor's Case, 1 Smith, Lead. Cas. (7th Ed.) 93, and to Spencer's Case, Id. 137. Where the right of distress was reserved or given with the rent, the payment might be enforced by distress of the goods of any one in possession under the grantee. Such a rent was termed a "rent charge." But where no right of distress was reserved there was no remedy for its collection, except the personal liability of him who made the covenant to pay the rent. This was termed a "rent seck." Id. While the statute of quia emptores cut off or crippled the remedies for the collection of rent in fee as between subsequent holders of the rent and land, the statute of 32 Hen. VIII. c. 34, greatly enlarged such remedies as between the assignees of the landlord and the assignees of the tenant in the case of leases for life or for years. Id. Again, as to cases not coming within the statute of Hen. VIII. it is generally held that, where the covenant is of a nature to inhere in and follow the land, the benefit of it will run with the land into the hands of subsequent grantees of the covenantee; but the converse is not true. The burden of the covenant will not follow the land into the hands of the covenantor's grantee, at least so as to make him personally liable; and there is generally no remedy against him, at least at law. Notes to Spencer's Case, supra. But in many instances in cases of this character equity has furnished relief against such grantee, not by making him personally liable, as if the burden of the covenant ran with the land in the technical sense of the term, but by injunction, or by declaring the burden of the covenant a lien on the land itself. See notes to Dumpor's Case, 1 Smith, Lead. Cas. (7th Am. Ed.) 135; note to Spencer's Case, Id. 175–178, 187, 223, 224. See, also, Dumpor's Case, 1 Smith, Lead. Cas. (9th Ed.) 145, 161–166; Spencer's Case, Id. 220; First Nat. Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264.

Let us now proceed to apply these principles to the case before us. Rebecca N. Graham never covenanted to maintain the roof, and by joining in the deed to the three trustees, and conveying her life estate in the third story of the building, she did not, either in law or equity, incumber her life estate in the rest of the building and property with the burden of the whole maintenance of the roof. She could subsequently have conveyed away her life estate in the rest of the property separately from her husband's reversion, and her grantee would not take such life estate burdened with such incumbrance.

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Then why should not her grantee enjoy the same immunity, even though he takes in the same deed a conveyance of her husband's reversion also? That reversion may, in equity, have been incumbered with the burden of the whole maintenance of the roof after the termination of the life estate. But the merger of that reversion with the life estate, by a conveyance of both estates to one person, has not enlarged that incumbrance by extending over the life estate, during its existence, the whole burden of maintaining the roof. That would be contrary to the plainest principles of equity. The life estate has not yet terminated, and the present owners are enjoying possession under it, and not under the reversion. Then, conceding without deciding, that by reason of other facts not hereinbefore recited Robert B. Graham has not been released by the lodge from his covenant to maintain the roof, and conceding also that after the termination of the life estate the reversion will be incumbered with the burden of the whole maintenance of the roof, and will be so incumbered after his death, even if he has been personally released, yet we must hold that this is the utmost extent of the right of the lodge to throw the whole burden of the maintenance of the roof on the other owners of the property. Then, so far as its present claim is concerned, the plaintiff can only proceed against the other owners of the property to compel contribution of their equitable share of the cost of maintaining the roof. 2 Washburn, Real Prop. (5th Ed.) 388. This conclusion renders it unnecessary to consider any of the other questions raised on this appeal.

The order appealed from is reversed, and a new trial granted.

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FIRST NATIONAL BANK OF DEVILS LAKE v. LANCASHIRE INSURANCE COMPANY.[1]

SAME v. HOME INSURANCE COMPANY.

July 13, 1896.

Nos. 10,026—(252).

Insurance—Authority of Adjusters—Salvage—Waiver of Conditions.

The insured held policies issued by a number of different insurers. A loss by fire occurred. The adjusters of two of these insurers came upon the scene, and, by the consent of the insured, sold the salvage. The next day the adjuster of the defendant insurers came also upon the scene, and had conversations with the insured. In actions on the policies of the latter insurers, *held*, from the evidence as to these conversations, and the other evidence in the case, the jury were justified in finding that the latter adjuster ratified the acts of the other adjusters in selling the salvage; that, under the terms of the policy, he is presumed to have had authority to make arrangements for the sale of such salvage, and consequently to ratify the sale already made; and that (following First Nat. Bank v. Manchester Fire Assur. Co., 64 Minn. 96), retaining the proceeds of such sale, or neglecting to see that such proceeds were promptly returned to the insured after the discovery by defendants that the policies in suit had been forfeited before the fire, waived such forfeiture.

Appeal by defendant in each action from an order of the district court for Ramsey county, Otis, J., denying a motion for a new trial, after verdicts in favor of plaintiff, as against Lancashire Insurance Company for $590.93, and as against Home Insurance Company for $2,363.72. Affirmed.

Kueffner, Fauntleroy & Rice and *Samuel E. Hall*, for appellants.

Hadley & Armstrong, for respondent.

CANTY, J.[2] These two actions were tried together. Each was brought on a fire insurance policy, to recover for a loss by the same fire. Plaintiff had a verdict in each case, and from an order denying a new trial in each the respective defendants appeal.

The insurance was on the same property, and the actions grow out of the same fire, as that mentioned in First Nat. Bank v. Manchester Fire Assur. Co., 64 Minn. 96, 66 N. W. 136. All of the conditions are

[1] Reported in 68 N. W. 1.

[2] Mitchell, J., absent, took no part.

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the same as they were in that case, except that the adjuster of these two insurance companies took no part in the sale of the damaged wheat, and did not arrive on the scene until the next day after the sale, and the question is whether he subsequently ratified that sale so as to bind these companies. Most of the evidence introduced on the trial of that action was used on the trial of these actions, and with it additional evidence was given, bearing on such question of ratification. Appellants contend that there is no evidence to show that there had been such a ratification, even if their adjuster had authority to ratify it. They admitted on the trial that a Mr. Munn was the adjuster of both companies, and represented them, as such, in this matter.

A. M. Schmidt, the manager of the insured, the Devils Lake Mill Company, was called as a witness, and testified that the adjusters of some of the other insurance companies (French and Cobben) arrived at Devils Lake, North Dakota, the place of the fire, on Monday, January 16, 1893, and on that day made the sale of the salvage wheat to Martin; that on the next day, Tuesday, the witness was introduced to Munn by Cobben. He further testified:

"Q. Well, state what was said about that [the salvage]. A. Why, Mr. Munn told me that he wanted to go down and look at the place where the fire was, and I told him that I thought they were loading the wheat there, and it then occurred; and I asked him about the salvage, and he says: 'Well, that is all right. Whatever Mr. French does,' he says, 'is all right.' * * * Q. Well, state everything that was said at that time,—how the subject came up, and the whole thing from the beginning. A. I told him that Mr. French said the salvage had to be sold,—we got to talk about that,—and that was all there was said. 'Well,' he said, 'whatever Mr. French does in the matter, it is all right.' That is all that was said between Mr. Munn and myself."

On being subsequently recalled, the witness further testified:

"Q. Now, Mr. Schmidt, I wish you would state in detail, fully, just what talk you had with Mr. Munn about this sale of salvage wheat. A. Well, Mr. Munn, he was coming down to the hotel, and I met him right on the sidewalk, on Kelly avenue, and he asked me where I was going. I told him I was going up to the hotel. 'Well,' he says, 'I am going down and look at the salvage wheat that is there.' I told him, I says, 'Why, they are loading it in the car.' He says, 'Is that so?' I says, 'Yes.' And I says, 'Mr. French told me that it had to be sold.' 'Well,' he says, 'whatever Mr. French did or does

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in the matter is all right. It is satisfactory to me,' he says. * * * Q. Well, anything about that,—whether it had been sold or had not been sold? A. Yes, sir; there was. He asked me who was loading the wheat. Well, there wasn't anything said about who bought the wheat. He asked me who was loading the wheat. I told him Mr. Martin was loading it in the cars. Q. Was there anything said between you and him as to whether the wheat had been sold, or was to be sold after? A. I don't remember whether there had or not. Q. You don't remember? A. I don't remember; no, sir. Q. But you did tell him who was loading that wheat at the cars? A. Yes, sir. The Court: You didn't tell him that the wheat had been sold? Witness: I don't know, your honor, whether I did or not. I don't remember. The Court: You didn't talk about the sale of the wheat, except you told him— Witness: I told him that Mr. French said the wheat had to be sold, and they were loading it in the cars, and he says, 'Whatever Mr. French does in the matter it is satisfactory to me.'"

On cross-examination the adjuster French testified:

"Q. Did you conceal from Mr. Munn the fact of the sale of said salvage? And, if not, what did you say to him about it, and what did he say to you, or in your presence? A. No; I informed him of the sale of said wheat. He said he would not take any part in the adjustment of said loss, because he believed that Mr. Schmidt claimed that there was four times the quantity of grain in the elevator at the time of the fire than he [Munn] believed there really was."

Munn was called as a witness, and testified that after arriving on the train, Tuesday afternoon, he went down to the ruins. Said the witness:

"I looked over the ruins, and noticed the burnt grain that was there. It was about all loaded on the car. I think there was a very small pile, perhaps as high as one of those desks. They had the grain nearly all loaded into the cars when I was there that afternoon."

Munn denied that he met Schmidt on the street, or ever had any such conversation at all with him as testified to by Schmidt. But this conflict of evidence raised only a question for the jury.

We are of the opinion that on this evidence the jury were justified in finding that Munn knew that a sale had in fact been made by the other adjusters, and the claim that he did not have such full and sufficient knowledge thereof that his statements could amount to a ratification is untenable. It seems to us, also, that the jury were justified in finding that he knew that the sale had been made by the other adjusters, not for the benefit of their companies alone, but for the benefit of all the insurance companies interested in the salvage;

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that Munn and these other adjusters understood the relative rights of the different insurance companies in this salvage; and that Munn knew that French and Cobben made the sale with the expectation that Munn's companies would ratify their acts, and come in and take the benefit of those acts. These adjusters were all experts, and must be presumed to have understoood their business. Then Munn had but little reason to suppose that French and Cobben claimed any exclusive right to, or benefit from, the salvage so sold by them. These facts being found by the jury, the situation made it peculiarly the duty of Munn to speak, and repudiate the acts of French and Cobben in selling the salvage, if he did not intend to ratify the same. But there is evidence tending to prove that he expressly ratified the same. We are also of the opinion that, if Munn had authority to join in making the sale originally, he had authority to ratify it after it was made. That he had such authority to join in making the sale originally is settled by the opinion in the former case above referred to.

There is no evidence in this case that Munn had any other authority than such as would be implied from his general duties as adjuster, and it is contended by appellants that his general duties as adjuster did not, under the terms of this policy, give him any authority to sell or dispose of this salvage. The policies provide,

"It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality."

The policies further provide,

"Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided."

We construe these provisions to give the insurer a right to take the salvage, whether he replaces it with new property or not, and the mode of ascertaining its value may be agreed upon by the parties at the time. The adjuster is presumed to have authority to attend to these matters.

All the other questions in the case are disposed of in said former opinion.

Orders affirmed.

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SAM R. EIDE v. NEHEMIAH P. CLARKE.[1]

July 13, 1896.

Nos. 10,080—(244).

Action to Quiet Title—Lien and Title—Judgment in Former Suit—Res Judicata.

The plaintiff, at the commencement of the first action to determine adverse claims under the statute, held a lien on the land in question, which he claimed had at that time ripened into a title, but which in fact had not. The case was tried. The court so found, and ordered his complaint to be dismissed. Thereupon he moved for additional findings, setting out the facts out of which his lien arose, and declaring the same a valid lien on the premises, which findings were allowed, and judgment ordered accordingly. In the judgment entered, it was adjudged that he had a valid lien on the land, but no other interest in it. Between the time of trial and the time of the application for additional findings, his lien ripened into a title, which cut off the inferior valid lien of defendant; but this lien was by the judgment adjudged to be valid, and subsequent to plaintiff's lien. In a subsequent action brought by plaintiff to determine defendant's adverse claims, *held*, the plaintiff's lien having given him no right to possession, and having failed to prove title, any further question as to its legality or priority was wholly foreign to the first action, but was injected into it and voluntarily litigated by the parties, it was also a question to determine which no independent action could be maintained between the parties. It was therefore not in the nature of an amendment which related back to the commencement of the action thus prematurely brought, but must be considered as a proceeding commenced at the time the application was made for additional findings, at which time plaintiff had no lien, but had the title in its stead. The judgment is valid, though irregular; and, whether it speaks from the date of its entry or only from the time of such application, it is in either case an adjudication that plaintiff had no title to the land, and estops him from claiming that he had such title, or that defendant's lien is cut off by the same.

Action to Quiet Title—Right of Plaintiff in Possession.

Plaintiff, being in possession at the time the first action was commenced, had a right, under the statute, though he had no title, to maintain the action for the purpose of determining the validity of defendant's claim of lien; but it was foreign to the action to go further, and determine the priority of the liens on a title under which plaintiff did not hold, or claim to hold.

[1] Reported in 68 N. W. 98.

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Appeal by defendant from an order of the district court for Swift county, Powers, J., denying a motion for a new trial. Modified.

G. W. Stewart, for appellant.

S. H. Hudson and *Brooks & Hendrix*, for respondent.

CANTY, J. Both parties claim that their rights in this action are res adjudicata, by reason of the judgment in a former action between them.

The former action was commenced in October, 1891, by this plaintiff against this defendant to determine the adverse claims of the defendant to the land in question. Plaintiff alleged that he was the owner of the land, and in possession, and that defendant claimed a lien adverse to him. Defendant, in his answer, denied plaintiff's ownership and possession; set up a lien by reason of a mortgage held by him, and made by a third party, who, defendant alleged, was the owner of the land; and defendant prayed that the action be dismissed. The case was tried before the court, without a jury, in April, 1892. And the court, on December 29, 1892, found that plaintiff was not the owner of the land, but was in possession of the same, and that he is not entitled to any relief, but that his complaint should be dismissed; that, by virtue of the mortgage set up in the answer, defendant had a lien on the land for the amount of the mortgage; that he was entitled to judgment accordingly, and judgment was so ordered. Thereupon, on the application of plaintiff, the court, on April 17, 1893, made additional findings of fact, from which it appears that tax judgments were entered against the land in the years 1882, 1883, and 1884, and tax sales thereupon had; that plaintiff was the owner and holder of the certificates of sale issued on such tax sales; that certain of said tax judgments were in all respects valid, and the sales thereon valid and regular. As conclusions of law, the court found "that plaintiff has a good and valid lien upon the real estate described in the complaint, for the aggregate amount paid by said S. H. Hudson for the several tax certificates herein found to have been issued to said Hudson" (plaintiff's assignor), for a specified sum; that defendant's lien was subordinate to plaintiff's lien; and that judgment be entered accordingly. Thereupon, on June 8, 1893, judgment was entered as follows:

"It is ordered, adjudged, and determined that said plaintiff has a good and valid lien upon the land described in the complaint, as follows [describing the land], to secure the sum of forty-two and $^{65}/_{100}$

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dollars, and upon [describing the land], to secure the sum of sixty-two and $^{78}/_{100}$ dollars, and plaintiff has no other interest in the land described in the complaint; that defendant has a lien upon the land described in the complaint to secure the sum of thirteen hundred and fifty dollars, and interest since the 20th day of June, 1891, at the rate of ten per cent. per annum; and that the lien of plaintiff aforesaid is prior and paramount to the lien of defendant as aforesaid."

Plaintiff appealed to this court from that judgment, but the only question urged was the sufficiency of notices issued in 1886 and 1889 of the time of expiration of redemption from the tax sales. Both the court below and this court held that these notices were void, and gave plaintiff no title. See Eide v. Clarke, 57 Minn. 397, 59 N. W. 484. Plaintiff seemed to have anticipated this result, as on June 27, 1892, he caused new notices to be issued, which were served on parties other than defendant, returned, and filed in the auditor's office on June 28, 1892, under which, if valid, the time to redeem expired in 60 days thereafter, or on August 27, 1892.

After the decision of this court affirming the judgment in the former action, this action was commenced under the statute to determine the adverse claims of defendant. On a trial before the court, without a jury, the court found all of the foregoing facts, and held the last notices of expiration of redemption valid; found, also, that the time to redeem expired accordingly; that defendant is estopped by the former judgment from questioning the regularity of the tax proceedings; that plaintiff is now the owner of the land free and clear of the lien and claim of defendant. From an order denying a new trial, defendant appeals.

It will be observed that the time to redeem expired, and plaintiff became the owner of the land (if at all), in August, 1892, or between the time the first action was tried and the time the court made its original findings therein, and before the time of the application for additional findings; so that plaintiff had already become the owner of the land when such application was made, and was the owner when the court, on that application, found that plaintiff had such lien, and when the judgment thereon was entered, adjudging that he had no other claim but such lien. The question then arises whether the judgment is an adjudication that, at the time it was entered, plaintiff was not the owner of the land, as defendant contends, or

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whether such judgment merely relates to the time of trial, and is only an adjudication that plaintiff was not the owner of the land at that time, as he contends. He contends that it was merely the case of an action prematurely brought, and no bar to the bringing of a subsequent action after his cause of action had in the meantime accrued, and cites such cases as State of Wisconsin v. Torinus, 28 Minn. 175, 9 N. W. 725, and Oleson v. Merrihew, 45 Wis. 397. No cause of action at all existed in either of these cases at the time the first action was commenced, so that in both cases the first action was wholly premature. In State of Wisconsin v. Torinus the cause of action did not accrue until the first action terminated in judgment. In Oleson v. Merrihew the cause of action accrued while the first action was pending, and before judgment therein.

Nothing is better settled than the rule that, if an action is prematurely brought, a cause of action subsequently accruing cannot be set up by supplemental pleading, and the action maintained. There are two classes of cases in which there is no difficulty: First. When the cause of action is prematurely brought; that is, before any cause of action at all has accrued. There the proper judgment is dismissal, and a cause of action accruing after the commencement of that action is not barred. Second. Where the claim accrues by instalments and the action is not premature, but during the pendency of the action a subsequent instalment becomes due, for which a separate action may be maintained. There the subsequent instalment cannot be set up by supplemental complaint, and, of course, is not barred. But a type of case materially different from this class may sometimes arise, where the action is not premature, but increases during the pendency of the action, but not by the addition of some well-defined, distinct instalment, or where the original cause of action itself changes, and becomes something else; as, for instance, where a lien changes into a title, during the pendency of a statutory action to determine its character as an adverse claim. Whether or not, in such a case, the judgment speaks from its date, or only from the day of trial, is a question which we need not here determine.

We are of the opinion that the case now before us does not belong to any of the types or classes above referred to. It is simply a case where, as to the matter in question, the first action was prematurely commenced, but, during the pendency of the action, the parties in-

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jected into it, and voluntarily litigated, such matter, which was wholly foreign to the action, and for which neither this action nor any other action could at that time have been maintained at all; and on this matter a judgment on the merits was rendered, while the only proper judgment which could have been entered if the parties had proceeded regularly was a judgment which took no cognizance of this matter at all. At the time that the first action was commenced, plaintiff had no title; nothing but the naked possession. It is true that the statute authorizes any one having possession, without title, to maintain an action to determine adverse claims. Child v. Morgan, 51 Minn. 116, 52 N. W. 1127. Then plaintiff was entitled to maintain the first action, for the purpose of determining the validity of defendant's mortgage lien; and if plaintiff held or claimed under the title on which that mortgage was a lien, he might perhaps have been entitled (at least on proper pleadings) to go further, and show that, although defendant's lien was in fact valid, plaintiff himself had a paramount lien on the same title, which rendered defendant's lien less valuable or less effective. If plaintiff held that title, and had brought this action for the purpose of determining his rights under the same, he might incidentally have litigated the priority of these liens in determining such rights; and, as incidental to determining such priority, he might, perhaps, have litigated the validity of his own lien. But plaintiff is a total stranger to that title, and his lien gave him no right to possession, and in no manner aided his possession. Then neither the validity nor priority of that lien was a matter to be determined in that action, or in any other action between these parties alone, brought solely for that purpose. A bill in equity for that purpose would not lie between these two lien claimants alone, and not as incidental to the granting of some other relief. Then it seems to us that the foreign matter thus injected into the action cannot be regarded as in the nature of an amendment which relates back to the commencement of the action, or even to the time of trial. But the court had jurisdiction, and, though the judgment on the merits determining the validity and priority of plaintiff's lien is wholly irregular, it is valid.

We are of the opinion, therefore, that, so far as this judgment adjudicates the status of plaintiff's lien, it does not relate back to the commencement of the action, or to the time of trial, or any further

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back than the time when such irregular controversy was injected into the case by the application of plaintiff to have additional findings made by the court; that, as to this controversy, if the judgment does not speak from the time of its entry, it does not, at least, speak from any earlier time than the time at which such application for additional findings was made. But several months prior to that time plaintiff's lien had ripened into a title. Then we must hold that he is by the judgment estopped from asserting that title, or from asserting that he still has anything more than a lien for the taxes, as was adjudged by that judgment.

The conclusions of law of the court below are set aside. In other respects the order denying a new trial is affirmed, and the cause remanded to the court below, to enter judgment in accordance with this opinion.

ULICK L. LYNOTT v. CHARLES E. DICKERMAN.[1]

65 471
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July 13, 1896.

65 471
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Nos. 10,061—(249).

Constitution—Title of Act—Foreclosure.

Laws 1878, c. 53, is entitled "An act providing for the foreclosure of mortgages by advertisement." *Held*, the subject legislated upon in section 24 thereof is germane to the subject mentioned in the title of the act; and the act is not, because of section 24, unconstitutional, because embracing more than one subject, or embracing a subject not expressed in the title.

Foreclosure—Misappropriation of Surplus—Assignability of Right to Sue.

Whether the naked right to sue for the penalty provided for by said section 24 is assignable, quære. But *held*, the amount actually due from the mortgagee, and which he has misappropriated, is assignable without a transfer of the equity of redemption.

Appeal by defendant from an order of the district court for Ramsey county, Willis, J., overruling a demurrer to the complaint. Affirmed.

[1] Reported in 67 N. W. 1143.

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G. J. Lomen, for appellant.
Eckman & Stevenson, for respondent.

CANTY, J. This is an appeal from an order overruling a demurrer to the complaint, on the ground that the same does not state a cause of action.

The complaint alleges that defendant, the assignee of a mortgage, foreclosed the same by advertisement, and bid in the same at the sale for $964.20; that, in the notice of sale, he claimed as due, and there was due and owing, on the mortgage, the sum of $873.54, and no more; that, out of the sum so bid, he retained the sum of $81.35, as costs and disbursements of the sale, "as necessarily and absolutely incurred and paid therein"; but that "the actual costs and disbursements of said sale absolutely paid were $23.24, and no more; and that the excess of $58.11 was illegally and improperly retained from the proceeds of said sale, for costs and disbursements thereof." It is further alleged that the mortgagor, before the foreclosure sale, conveyed the premises to one Merchant; "that, before the commencement of this action, said Huntington W. Merchant, for a valuable consideration, sold, assigned, and transferred to this plaintiff the above cause of action against this defendant." The complaint demands judgment under G. S. 1894, § 6052, for three times the sum of $58.11, or $174.33.

1. The title of Laws 1878, c. 53,[2] in which this section originated (as section 24), is "An act providing for the foreclosure of mortgages on real estate by advertisement"; and it is contended by appellant that the act is unconstitutional, because the subject of this section, to wit, the penalty provided for, is not expressed in the title of the act. We cannot so hold. The subject of this section is the providing of a penalty for enforcing fidelity on the part of the mortgagee in the performance of his trust in foreclosing the mortgage, and accounting for the proceeds of the sale. Surely, this is germane to the subject mentioned in the title of the act.

2. The statute gives the penalty to the "mortgagor, his heirs or assigns." Appellant contends that the "assigns" intended by the statute are only those who take a transfer or conveyance of the equity of redemption, and that it was not the intention of the statute to make

[2] G. S. 1894, §§ 6028–6052.

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the naked right to recover the penalty assignable as a chose in action. Conceding, without deciding, that this is true, the right to recover the $58.11 wrongfully appropriated is assignable, and plaintiff is entitled to maintain the action to recover the same. Then, in any event, the demurrer was properly overruled.

Order affirmed.

GOODMAN COHEN v. AARON GOLDBERG.[1]

65 473
175 544
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July 18, 1896.

Nos. 10,104—(231).

Action for Conversion—Fraudulent Transaction—Cross-Examination.

In an action by a third party against a judgment creditor for conversion of property levied on as the property of the judgment debtor, but claimed by the plaintiff as his property, *held*, great latitude must be allowed in the cross-examination of the immediate parties to the alleged fraudulent transaction, and it is error to refuse to allow any such cross-examination having a reasonable tendency to throw light on such transaction, even though the inquiry is as to matters not touched upon in the direct examination.

Same—Punitive Damages—Evidence of Wealth of Defendant.

It is error to admit in such an action evidence of the wealth of the defendant, with a view to the recovery of punitive damages, unless there is evidence in the case tending to prove that he was guilty of gross oppression, or wanton disregard of the rights of the plaintiff, in converting the property, so as to justify the allowance of punitive damages.

Appeal by defendant from an order of the municipal court of Minneapolis, Holt, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $242. Reversed.

F. J. Geist and *S. Meyers*, for appellant.

Child & Fryberger, for respondent.

CANTY, J. This is an action for conversion. Plaintiff had a verdict, and from an order denying a new trial the defendant appeals.

K. Goldblum, a merchant at Minneapolis, sold a quantity of goods either to plaintiff, or one S. (or Sam) Sunel, but on the question of

[1] Reported in 67 N. W. 1149.

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which was the purchaser the evidence is conflicting. Goldblum shipped the goods to Madelia, in this state, and took a bill of lading in which he is named as consignee. This defendant held a money judgment against one Sam Shinnel, who, there is evidence tending to prove, was the same person as said Sunel, who was known by both names. After the goods in question arrived at Madelia an execution issued on this judgment was levied on them as the goods of the judgment debtor, Shinnel, and at the execution sale they were purchased by defendant. Plaintiff, claiming to be the owner of the goods, brought this action for their conversion.

1. On the trial, plaintiff, as a part of his case, offered in evidence "Exhibit A, bill of lading, so far as it relates to the bill of lading." This is the bill of lading above referred to, and at the foot of it is found the following: "Signature of party authorized to receipt for freight. S. Sunel." Subsequently, plaintiff called Sunel as a witness, and on his cross-examination the following proceedings took place: "Q. Are you the S. Sunel that signed a paper down at Madelia? (Objected to by plaintiff as irrelevant and immaterial, and not proper cross-examination, whereupon defendant's attorney offered to show by this witness, on cross-examination, that he is the person who signed the bill of lading at Madelia, and that the goods were taken from him by the deputy sheriff at Madelia the 22d day of April, 1895. Objected to by plaintiff as not proper cross-examination, which objection was sustained by the court, to which defendant duly excepted.)" This is assigned as error, and in our opinion it is error. On a question of the disposition of property in fraud of creditors, great latitude must be allowed in the cross-examination, at least, of the immediate parties to the transaction, such as plaintiff and Sunel are claimed to be; and it is error to refuse to allow any such cross-examination having a reasonable tendency to throw light on the transaction, even though the inquiry is as to matters not touched upon in the direct examination. Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; Wait, Fraud. Conv. § 281.

2. It was also error to admit evidence of the wealth of the defendant, with a view to the recovery of punitive damages. Evidence of this character is prejudicial, and unless a case for punitive damages is made its admission is error. No such case was made. There was no evidence of such gross oppression or culpable disregard of plain-

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tiff's rights as would warrant the allowance of such damages, but, on the contrary, there were many facts and circumstances in the case which might have led the plaintiff, in good faith, to believe that Sunel was the owner of the goods.

For these reasons the order appealed from is reversed, and a new trial granted.

INGRI OLSON v. NORTHWESTERN GUARANTY LOAN COMPANY.[1]

July 15, 1896.

Nos. 9629—(77).

Assignment of Mortgage—Payment to Original Mortgagee.

Payment of the amount due upon a mortgage to the mortgagee by the mortgagor after the mortgage has been assigned, but without notice of the assignment by the mortgagor, will extinguish the mortgage. Johnson v. Carpenter, 7 Minn. 120 (176), followed.

Same—Payment before Maturity—Good Faith.

Payment of a mortgage by the mortgagor to the mortgagee before maturity, with the accrued interest to day of payment, is no evidence of bad faith, nor is a want of good faith to be inferred because the mortgage was not produced at the time of the payment.

Action in the district court for Otter Tail county to obtain the satisfaction and discharge of record of a mortgage. Tabitha Lapsley and Mary Hazzard intervened, and from a judgment in their favor, entered in pursuance of the findings and order of Baxter, J., plaintiff appealed. Reversed.

John P. Williams, for appellant.

C. E. Chapman, for respondent intervenors.

BUCK, J.[2] On June 5, 1888, William Rima executed a mortgage to the defendant, the Northwestern Guaranty Loan Company, on the real estate described in the complaint, situated in Otter Tail county, Minnesota, to secure the payment of his promissory note for $700, executed by him on that date, due in five years from the date thereof.

[1] Reported in 68 N. W. 100.

[2] Mitchell, J., absent, took no part.

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with 7 per cent. interest, payable semiannually, and the said note was made payable at defendant's office in Minneapolis. On September 3, 1891, the said William Rima conveyed by warranty deed the real estate covered by this mortgage to the appellant, in which deed appellant assumed and agreed to pay the mortgage, and she has owned the real estate ever since. On September 10, 1888, the defendant sold and assigned the note and mortgage to the intervenors, and such assignment was lost by the intervenors, and no assignment was ever placed on record.

On March 3, 1893, Mr. Barrows, acting as the agent of the appellant, called at the office of the defendant at Minneapolis, and talked with S. M. Houghton, the vice president of defendant, about paying this mortgage. Mr. Houghton, after going to the books, told Mr. Barrows that the defendant had the Rima mortgage in the office, and that he could pay it, and that he would have to pay interest only to the day of such payment, and that he could send the money direct to defendant, or pay the same to defendant's agents, Lake & Lowry, at Fergus Falls, as was most convenient. Thereupon the appellant, through her agent, Mr. Barrows, did, on April 10, 1893, without any notice or knowledge that the mortgage had been assigned to intervenors, pay to Lake & Lowry $717.15 by his check to them on the First National Bank of Fergus Falls, that being the amount that was due on the mortgage on that day. The amount that would have been due at the maturity of the mortgage, to wit, June 5, 1893, is $724.50. Lake & Lowry accepted said check in payment of the same. Neither Lake & Lowry nor the defendant had the possession of the note and mortgage at the time of this payment. Lake & Lowry, on the day that Mr. Barrows paid this mortgage to them, sent their check to defendant at Minneapolis, drawn on the First National Bank of Fergus Falls, for the amount so paid them. Upon receipt of such check, the defendant notified Lake & Lowry that they had placed the same to their credit, and that the mortgage was held by parties in the east. The defendant deposited this check to its own credit in the Security Bank of Minnesota, and it was paid by the First National Bank of Fergus Falls April 13, 1893. The defendant afterwards checked out this money for various purposes for its own benefit. Lake & Lowry never informed appellant or her agent, Barrows, of the receipt of defendant's letter of April 12, 1893,

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in which the defendant informed Lake & Lowry that they had placed the money to their credit, until after defendant's property had passed into the hands of a receiver.

In October, 1894, the appellant brought this action against the defendant to compel a satisfaction of this mortgage. The defendant put in no appearance. The first time that the appellant ever knew that Tabitha Lapsley and Mary Hazzard claimed any interest in the mortgage was shortly before they intervened in the action. Upon trial they had judgment ordered in their favor, and from that judgment the plaintiff appeals.

The assignment of the note and mortgage from the Northwestern Guaranty Loan Company to Tabitha Lapsley and Mary Hazzard was never recorded. While such assignment is a conveyance, within the meaning of the recording laws of this state, yet by G. S. 1894, § 4183, it is expressly provided that

"The recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the mortgagee."

This leaves the law unchanged as to the effect of payment. The loan company was the original mortgagee, and the only party with whom the plaintiff ever dealt as having an interest or right in the note and mortgage. It was from the defendant company that the plaintiff obtained the money, to whom the mortgage was given. In the absence of any notice, she would have a right to presume that the defendant still had the mortgage in its possession. As she had no notice, either actual or constructive, of the assignment, she had a right to pay the mortgage to the defendant itself, or its legally authorized agents, which she did. When Lake & Lowry transmitted the money to defendant, it had no authority from them to place the money to their personal credit, although it appears that defendant did so credit it. Subsequently defendant used the money for its own benefit. Lake & Lowry did not communicate any of these facts, of which they had knowledge, to the plaintiff, until after the loan company became insolvent. Houghton's official position in the company, and his being in its building, transacting business for it therein at the time of the conversation with Barrows, clothed him with an apparent authority to designate the persons to whom the mortgage

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should be paid; and the defendant having received such payment in pursuance of the transaction with Houghton, and applied it to its own use, ratified the act of Lake & Lowry in receiving the payment, and the case stands as if payment had been made directly to the defendant, the mortgagee in the first instance.

The payment of the mortgage by the mortgagor to the mortgagee before maturity, with accrued interest to day of payment, is no evidence of bad faith; nor is a want of good faith to be inferred in such case because the mortgage was not produced at the time of payment. Foster v. Beals, 21 N. Y. 247; Van Keuren v. Corkins, 66 N. Y. 77. And a payment of the amount due upon a mortgage to the mortgagee by the mortgagor after the mortgage has been assigned, but without notice of the assignment by the mortgagor, will extinguish the lien of the mortgage. Johnson v. Carpenter, 7 Minn. 120 (176). Numerous authorities sustain the rule that the payment made by the mortgagor to the mortgagee upon a bond and mortgage, after an assignment thereof by the latter, when made in good faith, without notice, actual or constructive, of the assignment, is valid. Van Keuren v. Corkins, supra. Of course, the bond and mortgage are nonnegotiable instruments, and in some states this is the usual method of giving securities, without giving a negotiable note to secure them. In this state the more usual way is the giving of a mortgage, without a bond, to secure the negotiable note. The rule laid down in Johnson v. Carpenter has been the law of this state since the year 1862, and we do not feel disposed to depart from it.

The judgment is therefore reversed.

CANTY, J. (dissenting). I cannot concur in the foregoing opinion. The doctrine laid down in Johnson v. Carpenter, 7 Minn. 120 (176), is wholly out of joint with commercial usage. The rule that the negotiability of the note does not impart negotiability to the mortgage securing it is carried far enough in holding that, as against the assignee, the mortgagor may set up any defense which he had against the mortgagee while the latter held the note and mortgage, but that, if the mortgagee indorses away the note before maturity, the mortgagor pays him thereafter in his own wrong. If, while the mortgage is in the hands of the mortgagee, it is for any reason invalid, and in fact no mortgage, it is one thing to say that an indorsement of the

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note will not impart validity to the mortgage. It is quite another thing to say that a perfectly valid mortgage shall not follow the note of which it is the mere incident, but shall remain in the hands of the mortgagee, to be destroyed by the blind and heedless action of the mortgagor, when he insists on paying the wrong instrument. There is a vast difference between imparting life to a dead thing and killing a live thing. The majority cite, as authority for their position in this case, decisions from New York in cases where the mortgage secured nothing but a nonnegotiable bond, which is a very different matter. See 1 Pingrey, Mortg. § 1004; 15 Am. & Eng. Enc. Law, 855, note 3; Id. 860. As far as I can discover, New York has never held that the same rule applies to the case of a negotiable note secured by a mortgage and indorsed and transferred before maturity. But in Trustees of Union College v. Wheeler, 61 N. Y. 88, 106, 107, the court intimated that it did not, and in Gould v. Marsh, 1 Hun, 566, the court held it did not. In the cases of Hostetter v. Alexander, 22 Minn. 559, Oster v. Mickley, 35 Minn. 245, 28 N. W. 710, and Smith v. Parsons, 55 Minn. 520, 57 N. W. 311, the defense of the mortgagor related to the inception of the note and mortgage; and in the case of Watkins v. Goessler, supra, page 118, 67 N. W. 796, the assignment of the note and mortgage before maturity was a breach of trust, the assignee taking them in bad faith, in which case the subsequent assignment of them to the plaintiff therein did not cure it. It seems to me that this court went far enough in these cases. In all of these cases it was simply held that an invalid, paid, or dead mortgage could not be validated or reinstated by the indorsement of the note, even though the mortgage was a mere incident of that note. But to hold that the mortgage is not such a mere incident, but can be paid separately and apart from the note, and without any regard to the possession of the same, is going very much further.

Neither does G. S. 1894, § 4183, have anything to do with the questions here discussed. That section simply means that there must be something else besides the recording of the assignment of the mortgage to give the mortgagor notice. This point is most effectually disposed of in Burhans v. Hutcheson, 25 Kan. 625, 631, where the court says:

"Counsel for defendants say that, conceding the correctness of the general doctrine laid down in Carpenter v. Longan, 16 Wall. 271, yet

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the adoption of section 3, c. 68, Comp. Laws 1879, has placed a legislative restriction upon the negotiability of all mortgages executed since its adoption, and that this statute throws upon the assignee of negotiable paper secured by real-estate mortgages the burden of personal notification to the maker of the mortgage of the change of ownership, if he would cut off future payments to the mortgagee. Our attention is called to Johnson v. Carpenter, 7 Minn. 120 (176), and to Van Keuren v. Corkins, 66 N. Y. 77, interpreting a statute like ours. In Johnson v. Carpenter the mortgage is treated as a chose in action standing alone. In Van Keuren v. Corkins the suit was upon a bond and mortgage, and it does not appear that the bond was negotiable. * * * Section 3 speaks of the recording of the assignment of the mortgage, and does not by its terms refer to negotiable paper; and it seems to us a strained interpretation to hold its provisions applicable, where a debt is evidenced by a negotiable note, secured by mortgage upon real estate, when such mortgage is merely ancillary thereto, and follows the note wherever it goes, deriving its character from such instrument. A better interpretation, and one clearly more in accord with the law of mortgages in this state, is that such section has reference only to a mortgage standing alone, or one securing debts and notes of a nonnegotiable character. Under this interpretation, section 3 of the statute is not nugatory, but has ample room for operation."

In my opinion, the judgment appealed from should be affirmed.

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JOHN B. CEFALU and Another v. FITZSIMMONS-DERRIG COMPANY.[1]

July 15, 1896.

Nos. 9921—(208).

Sale—Acceptance—Waiver—Liability of Purchaser.

The defendant, a dealer in fruit at Duluth, ordered from the plaintiffs (wholesalers at New Orleans) a car of good Honduras bananas, to be shipped to St. Paul in care of the Duluth railway. They were so shipped, received by the railway, and carried to Duluth, where they were for the first time inspected, and found not to be as ordered. Thereupon the defendant wired the plaintiffs as follows: "Car bananas here, subject to your order. Not a first-class bunch in the car;" and received in reply the following telegram: "Take fruit. Will write." The defendant then took and disposed of the fruit. *Held*, that an acceptance or rejection of the fruit at St. Paul was waived, and that the defendant is liable only for the reasonable value of the fruit.

[1] Reported in 67 N. W. 1018.

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Appeal by defendant from an order of the district court for St. Louis county, Morris, J., denying a motion for a new trial. Reversed.

Draper, Davis & Hollister, for appellant.

Alford & Hunt, for respondents.

BUCK, J. The plaintiffs were wholesale fruit dealers at New Orleans. The defendant, on June 5, 1894, sent them the following telegram, viz.: "Jno. B. Cefalu & Bro.: Ship car of good Honduras bananas to-day or to-morrow to us, at St. Paul, care of St. Paul & Duluth Railroad. Advise." In response to this order, the plaintiffs the next day shipped a car load of bananas, as directed. At St. Paul the railroad company received the bananas, and carried them to Duluth, pursuant to a prior arrangement between the railroad company and defendant. When the bananas arrived at Duluth, the defendant immediately claimed that the bananas were of an inferior quality, and not according to the kind ordered, and forthwith telegraphed plaintiff as follows: "Car bananas here, subject to your order. Not a first-class bunch in the car;" and the respondent answered as follows: "New Orleans, La., June 13, 1894. Fitzsimmons-D. Co., Duluth: Take fruit. Will write." Thereupon the appellant had the car unloaded, putting the fruit in the banana rooms, and handled it in the usual way to ripen it, and fit the same for market, as it contended.

Appellant claims that it understood respondents' telegram to mean that it should receive the fruit, not as its own, to handle for respondents; that it did sell the fruit at the best advantage, and account to respondents for the proceeds, less a reasonable commission. Respondents' contention is that appellant handled the fruit as its own, and brought an action for the difference between what appellant accounted for and paid, and the invoice price, amounting to $207.90. Evidence having been given in support of the respective claims, the court directed a verdict in favor of the respondents for $207.90 and accrued interest. There was no contention but what the bananas were billed at the market price if they had been of the kind and quality represented by plaintiffs, and the defendant admitted that if there was a complete sale, and no other arrangements made, it would be bound by the price at which they were billed.

The principal controversy is over the question of the place of de-

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livery and acceptance, and the subsequent conduct of the parties in relation to the bananas. It is doubtless the true rule of law that, on a sale of goods, the place of delivery is the place of inspection and acceptance or rejection, but the rule can be waived by the acts or agreement of the parties. When the plaintiffs were notified by defendant that there was not a first-class bunch of bananas in the car, and that they were in Duluth subject to plaintiffs' order, the plaintiffs might legally have insisted upon the acceptance or rejection of the fruit at St. Paul, the place of delivery; but, instead of so doing, they wired defendant to "take fruit; will write." The fair inference to be drawn from such a telegraphic communication is that plaintiffs wished the defendant to take the fruit at all events. Defendant, instead of accepting or rejecting the fruit at St. Paul, chose to reject it, as not being in accordance with the conditions of purchase. Where was defendant to take it, then? The answer is, at Duluth. The fruit was there; the defendant was there; and there is where the telegram was sent, to take it. Therefore sufficient appears to show that plaintiffs waived its acceptance or rejection at St. Paul. And the fair inference from defendant's telegram to plaintiffs, that the fruit was at Duluth, subject to their order, is that it rejected or refused to accept it. Then, if, upon the request of the plaintiffs, it took the fruit, and used or sold it, it would be liable for its fair, reasonable value, and not the market price for which it was billed. But, if the minds of the parties did not meet as to just what disposition should be made of the fruit, still, as plaintiffs had waived its acceptance or rejection at St. Paul, and requested defendant to take the fruit at Duluth, which it did, and used it, it would then only be liable for its reasonable value, after deducting a fair and reasonable compensation necessary for taking care of and preserving or disposing of it.

We have examined the other questions discussed, but do not think that they are necessarily involved in the disposition of the case.

Our conclusion is that the order appealed from should be reversed. So ordered.

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MARY CLARKIN and Another v. BIWABIK-BESSEMER COMPANY and Others.[1]

July 15, 1896.

Nos. 9991—(235).

Licensee of Dangerous Premises—Liability of Owner—Reasonable Opportunity to Remove—Negligence.

Certain contractors erected a boarding camp upon mining property, where they were engaged in mining, under contract with the owners of the property; and, by permission of the contractors, plaintiffs occupied the camp, and boarded the contractors' workmen. Subsequently the contractors abandoned the contract and premises, and plaintiffs intended and attempted to remove from the camp, with their property used therein, but were delayed by reason of the severity of the weather, dangerous sickness of a member of their family, and financial inability in obtaining another place. The defendant company resumed possession of the mining property, and stored a large amount of dynamite in a building thereon, situate within 33 feet of the boarding camp; and, about three weeks thereafter, this dynamite, while being heated by defendants, exploded, damaging plaintiffs' personal property situate in the boarding camp. Prior to the explosion, defendants notified plaintiffs that, if they remained in the boarding camp, they would do so at their own risk, but gave them no notice to remove from the camp, and took no legal steps to compel them to do so. The defendants stored the dynamite in the building about three weeks before the explosion, and while the camp was still occupied by the plaintiffs. *Held*:

(1) That, under the facts appearing in this case, the plaintiffs remained in possession of the boarding camp as bare licensees, and that the question of whether they had reasonable opportunity to remove from the boarding camp with their property before the time of the explosion was a question for the jury.

(2) While the plaintiffs were in the actual possession of the boarding camp as bare licensees, the defendants would be liable for damages to plaintiffs' property therein situate resulting from the explosion of the dynamite, if the explosion was caused by defendants' want of ordinary care and skill in its management, although in their lawful possession at the time.

Action in the district court for St. Louis county to recover damages for the destruction of personal property. The case was tried before Moer, J., who directed a verdict in favor of defendants. From an

[1] Reported in 67 N. W. 1020.

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order denying a motion for a new trial, plaintiffs appealed. Reversed.

Jno. Jenswold, Jr., for appellants.

Billson, Congdon & Dickinson, for respondents.

BUCK, J.[2] The Biwabik-Bessemer Company (defendant) was incorporated June 16, 1894, and soon thereafter leased certain mining property from the Biwabik Ore Company. The other defendants, Jones and Kimberly, were, respectively, the superintendent and timekeeper of the Bessemer Company; Jones having charge of its affairs at its mine, where the events hereinafter referred to occurred. Prior to the leasing of the said mine by the defendant company, a firm by the name of Fitzgerald Bros. & Sisk had been stripping the mine and mining ore for the ore company. In and about this business, this firm employed a large number of men, and to accommodate them the firm built what was known as "Fitzgerald's Camp," a building about 60 feet long by 28 feet wide, situate some 600 or 700 feet from the mine. The plaintiffs, who are sisters, had for many years been keeping boarding camps for Fitzgerald Bros., who were railroad contractors; and in December, 1893, they entered into a contract with the Fitzgeralds to board their laborers for a period of three years, the Fitzgeralds to furnish the camp boarding house, and to pay them for the board which plaintiffs furnished. During the ensuing winter they were not to pay any rent, and the amount of subsequent rent was never agreed upon, and it does not appear that any was ever paid. Plaintiffs commenced boarding Fitzgerald's men, who were stripping the mine, and so continued to board them until the work ceased for the winter. When work was renewed in the spring, they continued to board Fitzgerald's men, to the number of about 30, until work closed about November 30, 1894. In the month of October, a misunderstanding arose between Fitzgerald and the company; and he left the work in care of his foreman, stating to plaintiffs that he expected the difficulty would be adjusted, and that he would return and finish his contract, and that plaintiffs would have all the boarders they could keep during the winter; and they knew nothing to the contrary until January 10, 1895, when the defendant Kimberly told them that the defendant company had bought the camp, and, if they wanted the contract to board the

[2] Mitchell, J., absent, took no part.

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men, to see the defendant Jones. The Fitzgeralds gave up the contract December 5, 1894, and abandoned the work.

About February 1, 1895, the defendant company, with a crew of men, commenced stripping the mine at a point within about 700 feet of the camp occupied by the plaintiffs. About 33 feet from this camp was a small office building, which had been built by the Fitzgeralds, standing about one foot above the ground, upon blocks; was 16 feet by 20 feet in size, with a window and door; and was built of rough boards standing on ends, the outside of which was covered with tar paper, the inside being bare, and, by reason of the manner of its general construction, required considerable heat to warm it. It was about 200 yeards from the nearest house, and within a quarter of a mile there was a cluster of houses occupied by some 15 families, in the outskirts of the town of Biwabik. The Fitzgeralds left the key to this office with the plaintiffs, who, in January, 1895, turned it over to the defendant Kimberly. From the first part of February, until February 24, 1895, the defendants stored dynamite in this office building, which was necessary for the mining operations carried on by the defendant corporation at its mine. When frozen this dynamite would not explode, and, before it could be used for mining operations, it had to be warmed to soften it. For this purpose the defendants placed it near the stove, according to the temperature of the room, usually 80 degrees above zero. Fire was usually kept in this building through the days, but not at nights. During the month of January, 1895, the weather was very cold, the thermometer averaging about 20 degrees below zero, and at times it was 40 degrees below. The room where the dynamite was stored was heated by a box stove, about four feet long, 30 inches wide, and 14 inches high, and at times the heat was intense; as one of the witnesses expressed it, "red hot part of the time." On February 24, 1895, about 600 pounds of dynamite was stored in this office building, and a portion of it was being warmed by the fire in the stove, when an explosion occurred, destroying the office building and the boarding camp, and also a large amount of the personal property of the plaintiffs.

From February 4, 1895, until a few moments before this explosion, there lived with these plaintiffs, in this boarding camp, a niece of the plaintiffs, about 12 years old, and their father, 76 years old, who was dangerously sick and confined to his bed, until Feb-

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ruary 22, when he was just able to walk, but still weak. About February 15, the defendant Jones sent word to the plaintiffs that, if they remained in the boarding camp any longer, it must be at their own risk. Reasons were testified to by one of the plaintiffs as to why they did not move away from the camp. One was the dangerous illness of their aged father, and the other, that they were financially unable, although they made an effort to do so, and expected to move about March 1, 1895. The weather was also intensely cold. It is quite evident that the fire occurred from the great heat of the stove, or by its setting fire to inflammable material near it, and causing the dynamite to explode. Upon the alarm of fire being given, plaintiffs succeeded in getting their father and niece into a cave, about 16 feet from the camp, before the dynamite exploded.

After the testimony was closed, the court, upon motion, instructed the jury to return a verdict for the defendants, which was done accordingly.

Upon this statement of the facts arises the question of the liability of the defendants for the destruction of plaintiffs' property by the explosion.

We do not consider the question of landlord and tenant, discussed by the respective counsel, as at all material in the case. The premises were under the control of the defendant company and its employés. While the Fitzgeralds and Sisk were the contractors carrying on the mining operations for the Biwabik Ore Company, they had the rightful possession, under the contract, of the premises upon which the boarding camp was erected, as incident to their business, and they contracted with plaintiffs to board their mining laborers in this boarding camp, and the Fitzgeralds and Sisk were to pay plaintiffs for so doing. This gave the plaintiffs a license to occupy the boarding camp as long, at least, as the Fitzgeralds and Sisk continued their business under the contract, and permitted plaintiffs to occupy such camp. When Fitzgerald Bros. & Sisk abandoned the contract, the defendants never gave the plaintiffs any notice to remove from the premises, but only notified them that it was dangerous for them to remain in the boarding camp. Their right to remain there was not openly denied or asserted by the defendants. As they were there in the first instance by permission of Fitzgerald Bros. &

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Sisk, we are of the opinion that the evidence shows that they remained there as bare licensees.

In such case they would have a reasonable time to remove therefrom. Ingalls v. St. Paul, M. & M. R. Co., 39 Minn. 479, 40 N. W. 524. What was such reasonable time, under the facts of this case, was a question for the jury. For several weeks prior to the explosion, the plaintiffs' father was seriously sick. This was the middle of winter, in a cold climate, with the thermometer sometimes down to 40 degrees below zero, and the average cold very severe, and the opportunity for procuring another place to live limited, not only on account of the locality, but on account of the extreme poverty of the plaintiffs. While financial inability to procure another place, and the expense of removal, would not of itself justify the plaintiffs in not removing from the place if they were there by absolute wrong, and had notice to remove, yet all the facts stated, together with the fact that these plaintiffs are women, without male assistants, it seems to us, make the case peculiarly one which should have been left to the jury to consider and determine as to whether they had a reasonable opportunity to remove from the camp.

When the plaintiffs originally took possession and commenced to occupy this boarding camp, this dangerous agency was not in their immediate vicinity. It was only about three weeks before the explosion that the defendants first stored this dynamite in this office building, situate so near to the plaintiffs' boarding camp. Previously it had been stored in a building a quarter of a mile away. The rule which is sometimes applied, that trespassers assume all risks from the condition of the premises upon which they enter is not applicable to this case. The defendants knew full well the dangerous character of this dynamite, and in the use of such dangerous agency the law requires, if not the greatest care, when human lives or property interests are in jeopardy, at least ordinary care in its use. It was not the case of mere passive acquiescence in a trespasser or a bare licensee coming upon the premises where there was a defect, and thereby receiving an injury, but a damage resulting from the affirmative active negligence of the defendants in handling an inflammable and powerful instrumentality which they knew required a great degree of care in handling.

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"Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care."

Kay v. Pennsylvania R. Co., 65 Pa. St. 269.

It seems to us that the duty of the defendants in this case rested upon the plainest principles of justice and humanity. The injurious consequences which resulted from this explosion might have been foreseen and expected by the defendants in placing this dynamite near to a stove kept red hot, and in a wooden building, without any person left to guard it. They could not relieve themselves of the responsibility of their affirmative acts by simply notifying the plaintiffs that, if they remained in camp, they did so at their own risk. The notice itself shows how fully the defendants understood and comprehended the great danger to which the plaintiffs were subject by the manner in which the dynamite was being handled and managed. If we assume that the plaintiffs had no reasonable opportunity to move their household and property before the time of the explosion, and that they remained in the actual possession of the boarding camp as bare licensees, with their personal property situate therein, the defendants would be liable for damaging this property by the explosion of the dynamite, if such explosion was caused by want of ordinary care and skill in its management by defendants, although they were then in the lawful possession of the premises where the dynamite was stored. Ordinarily, questions of negligence are for the jury; and, upon the testimony introduced in this case, different minds might draw different conclusions, and therefore this question of negligence should have been submitted to the jury. It was therefore error for the court to take these questions from the jury, and direct a return of a verdict for the defendants.

Order reversed.

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GUSTAV MARTINI v. NIELS CHRISTENSEN and Others.[1]

July 15, 1896.

Nos. 9994—(251).

Appeal—Sufficiency of Evidence.

Evidence considered, and *held* sufficient to justify the finding of the trial court.

Action in the district court for Ramsey county. The case was tried upon the issues between plaintiff and defendant Arend before Willis, J., who found in favor of said defendant. Upon the hearing of the motion of plaintiff for a new trial, the court suggested that the motion would necessarily be granted, unless the answer of defendant Arend should be amended so as to contain allegations of fraudulent conduct on the part of defendant Christensen and his agent, corresponding to the facts as found. Thereafter, upon motion of defendant, an order was made granting leave to amend the answer as suggested, whereupon an order was made denying a new trial. From both orders, plaintiff appealed. Affirmed.

William G. White, for appellant.

Stevens, O'Brien, Cole & Albrecht, for respondent.

BUCK, J.[2] The plaintiff is the assignee of a real-estate mortgage made by the defendant Christensen, who afterwards conveyed the premises to the defendant Arend; and, by the terms of the deed, Arend assumed and agreed to pay the mortgage of $1,600. This action is brought to recover the amount of the mortgage indebtedness.

The defendant Arend alone answered; and in his answer originally drawn and served he alleged, in substance, that the assumption clause was inserted by the mistake of the scrivener who drew the deed, and by the mutual mistake of all the parties to the transaction. At the commencement of the trial, Arend asked leave to amend his answer, by inserting therein, after the words "by mutual mistake and inadvertence of all the parties to said transaction," the words "and fraud of the grantor." This amendment was granted by the court. It appears that the property conveyed to Arend was purchased by him in

[1] Reported in 67 N. W. 1019. [2] Mitchell, J., absent, took no part.

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exchange for real estate conveyed by Arend to Christensen, and that in the transaction one Frederickson acted for Christensen, and one Schwabe for Arend, the latter not being present; and he gave specific instructions to Schwabe to have the conveyance so drawn that it would not bind Arend to pay the mortgage. Prior to the execution of the deed containing the assumption clause, a written contract had been made between the parties for the exchange of the property, which contained no assumption clause. After the execution of the deed, Schwabe took the deed, and had it recorded, and several weeks thereafter it came into the possession of Arend, who read it, but was ignorant of the meaning of the assumption clause, which provides that the conveyance is made subject to a first mortgage, for the sum of $1,600, and a second mortgage, of $400, giving dates, and when and where recorded, and also contains these words: "Said described mortgages and interest thereon the second party hereby assumes." Arend did not say anything to any one about this clause until just before this suit was brought.

When the defendant rested, the plaintiff did not raise any question as to the sufficiency of the evidence to establish fraud or mutual mistake, either by submitting the case to the court for its decision thereon, or by motion for judgment, but voluntarily proceeded to introduce evidence of the entire transaction, including the question of fraud; and this evidence, together with that introduced by the defendant Arend, both before and after the defendant rested, was sufficiently conclusive to justify and sustain the finding of the trial court that Christensen fraudulently caused the assumption clause to be inserted in the deed, with the intent to defraud Arend, and that he was entitled to judgment against the plaintiff. The question, therefore, of a subsequent amendment to make the pleading conform to the facts proven, is entirely immaterial. The court had a right to find the facts, as presented by plaintiff, upon an issue voluntarily litigated by him.

Order affirmed.

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CHARLES L. KIEWERT v. PETER ANDERSON and Another.[1]

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July 15, 1896.

Nos. 10,015—(279).

Homestead—Construction of Statutes.

Homestead interests are favored by the constitution and statute, and laws applicable thereto should receive a liberal construction.

Same—Extension of City Limits.

A homestead right, once acquired, is a valuable one; and an act of the legislature extending the limits of a city so as to include the homestead, while it retains all its characteristics as such, will not operate to reduce or diminish the rights of the owner of the homestead therein, unless the land surrounding it has become urban in its character.

Same—Unplatted.

Where the homestead situated within an incorporated city is used for agricultural purposes, and surrounded wholly or partly by laid-out and platted lands, rural in character, this does not affect its homestead character, so long as the homestead land itself is not laid out and platted.

Appeal by plaintiff from an order of the district court for Dakota county, Crosby, J., denying a motion for a new trial. Affirmed.

William G. White, for appellant.

John B. & E. P. Sanborn, for respondents.

BUCK, J.[2] This is an action in ejectment to recover possession of lots 6 and 11, and a portion of lot 5, of Smith's outlots to West St. Paul. The plaintiff claims under an execution sale of these premises, from which no redemption was made. The judgment was recovered on February 16, 1894, and docketed on the same day; and the land was sold after due and proper notice, on April 16, 1894. No attack is made upon the regularity of the sale. The defendants, in their answer, claim that all the lots in question are their homestead, and, by reason of this fact, that they were exempt from sale under plaintiff's judgment and execution. The court so found, and ordered judgment for the defendants, and the only question presented here on this appeal is whether the conclusions of law follow from the facts found.

[1] Reported in 67 N. W. 1031.

[2] Mitchell, J., absent, took no part.

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The further material facts are as follows: On June 26, 1874, Robert A. Smith was the owner of 80 acres of land in Dakota county, and he then caused the same to be laid out and platted into certain lots, known as "Smith's Outlots," and this plat was duly recorded July 24, 1874, in the office of the register of deeds of Dakota county. On November 21, 1876, Smith and wife conveyed to the defendant Peter Anderson lots 5, 6, 11, and 12 of these outlots, of which lots 5 and 6 contained about 3.40 acres each, and lots 11 and 12 each contained a little over 4 acres each. On April 4, 1883, upon petition of Smith, proprietor of the plat, and Anderson, owner of said lots, said plat was, by a decree of the district court, vacated as to these four lots, and as to that portion of Mina street which is bounded on the north by said lots 5 and 6, and on the south by lots 11 and 12; but no evidence of said decree of vacation was ever recorded in the office of the register of deeds of Dakota county, and no evidence offered on the trial tending to show that plaintiff had any actual knowledge or notice thereof. When Anderson bought these lots, in 1876, of Smith and wife, he entered into possession of the same, including that portion of Mina street which was vacated, and in the year 1877 built a house, barn, and other buildings upon lot 5, near the southeast corner thereof, and built a fence around the whole four lots, including said street, inclosing the same in one inclosure; and he grubbed and broke all the land, and has ever since resided upon the same with his wife and children, and cultivated the same, and raised vegetables thereon for the St. Paul markets, each year since the year 1877, and has always maintained and kept up the fence inclosing this land. The defendants do not now own, and never have since 1876 owned, any other land except the tract above described, and have never had any other homestead. Said land so owned, inclosed, and occupied by the defendants comprises about 15 acres in one body. That portion of said land known as lots numbered 6 and 11 is situated in the township of Mendota. Prior to 1887 that part of this land which was known as lots 5 and 12 was situated in the township of West St. Paul, but in 1887, by an act of the legislature, the same was included in the corporate limits of the city of South St. Paul, and in 1889 the same was included in the corporate limits of the city of West St. Paul by an act of the legislature. Prior to 1887 no part of said land was within any incorporated town, city, or village. In 1887,

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1888, and 1889 the population of South St. Paul did not exceed 2,000. The population of the city of West St. Paul never at any time exceeded 1,700. The dwelling house and buildings so constructed as aforesaid by the defendants, and occupied by them as their residence, were so occupied by them on February 24, 1894, and are located upon that portion of what was known as lot 5 which the sheriff certified in his return upon the execution and in his certificate of sale that he sold to the plaintiff for $500. The sheriff never demanded of the defendants, or made any request of them, that they select or designate the portion of these lands which they regarded as their homestead; and he never surveyed or set apart any portion of the same as the homestead of the defendants. The defendants have ever since they acquired title to the said lands, in 1876, used the same solely for agricultural purposes. On the north of the property herein described as being owned by the defendants, and north of Annapolis street, substantially all of the property between that point and the Mississippi river has for many years been laid out and platted into city lots, and since 1876 has been a portion of the city of St. Paul. All of the property herein referred to as having been laid out into city lots, and which is described as being on the north and on the east and on the south and on the west of defendants' lands, has for at least eight years been bought, sold, and used as city lots, and the size of said lots is the usual size in such cases, namely 40 feet in width, and about 120 feet in length.

The court found, as a conclusion of law, that the defendants were the owners of the land in controversy, and entitled to the possession of the same.

It is quite evident that these lots, containing between three and four acres each, were not laid out into "city lots," as the term is ordinarily used and popularly understood, but for agricultural purposes, for which purpose they have always been used by the defendants, and neither said lots nor the land surrounding them are urban in their character. Some 11 years before the plaintiff obtained his judgment, the plat was duly vacated as to these lots, by decree and judgment of the district court; and the same became a matter of public record in the office of the clerk of the said court. It is true that G. S. 1894, § 2317, provides that the court may order that its proceedings to vacate a plat be recorded in the office of the register

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of deeds, as well as in the office of the clerk of the court; but we think, when they are duly filed in the office of the clerk of the district court, and judgment entered thereon, it is a valid judgment, although the proceedings are not recorded in the office of the register of deeds, and that such judgment cannot be attacked collaterally. The defendants being in the actual possession of the premises, having them fenced, and using them continuously for agricultural purposes, constituted full notice to third persons of their rights in the premises. After the vacation, the land became an entire tract, and at that time it was not situated in any incorporated city, town, or village, nor was it so situated until the year 1887. When the plat was vacated as to these lots, the premises were in precisely the same condition as if the plat had never been made; hence the defendants' right to the premises as a homestead vested in them by virtue of their residence upon the same, and their use thereof for agricultural purposes. This right became fixed in the defendants many years before the plaintiff recovered his judgment.

The homestead, once acquired, is a valuable right, and an act of the legislature extending the limits of a city so as to include the homestead, while it retains all its characteristics as such, will not operate to reduce or diminish the right of the owner of the homestead unless it becomes in fact urban property. Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490.

Because the premises are wholly or partly surrounded by laid-out and platted lands does not affect its homestead character, so long as the land itself is not laid out and platted, and is not urban in its character. See, also, In re Smith's Estate, 51 Minn. 316, 53 N. W. 711.

The premises are not urban in the purpose for which they are used, nor in size, compared with other city lots laid out or platted in the city where these premises are situate. Homestead interests are favored by the constitution and statute, and the law applicable thereto should receive a liberal construction. In our opinion, the whole tract claimed by defendants is exempt as a homestead, and the plaintiff acquired no title by the sale of any part thereof under his execution.

Order affirmed.

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THEO. BASTING, Receiver, v. NORTHERN TRUST COMPANY.[1]

July 15, 1896.

Nos. 10,023—(248).

Appeal—Weight of Evidence.

Evidence considered, and *held* sufficient to justify the finding of the trial court.

Action in the district court for Hennepin county. The case was tried before Elliott, J., who found in favor of plaintiff, and ordered judgment in his favor for $3,637.50. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Carman N. Smith, for appellant.

Cobb & Wheelwright, for respondent.

BUCK, J.[2] This case was before this court upon a former appeal, and is reported in 61 Minn. 307, 63 N. W. 721, and it is not necessary to review the law as there laid down. Most of the facts now appearing were there stated.

The sufficiency of the evidence to sustain the finding of the court upon one point is challenged. The defendant, in this respect, contends that, at the time of the delivery of the stock certificate as a pledge, Nimocks, from whom it was obtained, represented to the defendant that 75 shares were fully paid up, and were not subject to calls and assessments; that defendant believed these representations to be true, and relied upon them; and that, so relying upon the truth of these representations and statements, the loan was made, and said shares of stock were accepted as collateral security. The court found as a fact that none of these allegations were sustained by the evidence, and that they were not true. The correctness of this finding rests upon the testimony of Charles Kittleson, who was the defendant's secretary and treasurer.

Upon direct examination he testified that Nimocks represented that the stock of the Times Company was of the par value, and that

[1] Reported in 67 N. W. 1017.

[2] Mitchell, J., absent, took no part.

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all of the assessments were paid up; and that he believed Nimocks' statement that the stock was fully paid. But upon his cross-examination he testified as follows:

"Q. You asked him if the stock was fully paid? A. Yes; I think—Well, I asked him if he considered this stock as valuable, good collateral. Q. That is all you asked him? A. I might have asked him other questions. That was the main point. Q. Did you know anything about the value of the stock at that time? A. No, sir. Q. Did you ask him who was connected with the company? A. I think he told me who were the promoters of the company. Q. Did you ask him what business it was engaged in? A. I was aware of that. Q. What was it? A. Printing. Q. What? A. A newspaper. Q. Did you ask him whether the company was in good financial condition? A. I don't think so. Q. Didn't you ask him that question? A. No, sir. Q. Now, then, in substance, all that you asked him was whether that was sufficient security for that note? A. That is about the substance of it. Q. As to whether or not Mr. Nimocks thought it was good security for the note? A. Yes, sir. Q. You didn't make any inquiries of the company? A. No, sir. * * * Q. You never made any attempt to examine the books of the Times Company, or make any inquiries of its officers? A. No, sir. Q. Your business at that time was on the corner of Nicollet and Fourth street? A. Yes, sir. Q. The Times office was in the same block? A. Yes, sir. Q. No new money was advanced to these gentlemen at that time? A. I don't think so."

This cross-examination very seriously shook the testimony of the witness given upon his direct examination. In such a case the trial court has a better opportunity of judging, from the manner and appearance of the witness, the weight to be given his testimony, than this court. The question is not free from doubt, but certainly the evidence is not so palpably and manifestly against the finding of the trial court as to warrant us in setting it aside.

Order affirmed.

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UNION IRON WORKS COMPANY v. FREDERICK O. KILGORE and Another.[1]

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July 15, 1896.

Nos. 10,035—(276).

Assignment of Account—Acceptance by Debtor—Garnishment.

An order attached to an account, directing its payment to the party named in the order, and delivered to him, operates as an assignment of the debt or account, although the order is not accepted by the debtor, and is valid as against a subsequent garnishment.

Action in the district court for Hennepin county against Frederick O. Kilgore and another, as defendants, and Shevlin-Carpenter Company as garnishee. Gemlo Iron Works Company intervened as claimant of the funds in the hands of the garnishee. Upon the disclosure of the garnishee an order was made by Russell, J., discharging the garnishee. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Conant & Conant, for appellant.

Chas. G. Laybourn and *Howell W. Young*, for respondents.

BUCK, J.[2] On December 31, 1894, the garnishee, Shevlin-Carpenter Company, a corporation, gave an order of purchase to the defendant Kilgore for a set of patent steam press rolls, to be completed and delivered at the mill of the garnishee on or before March 15, 1895, to be guarantied perfect in every way, for which the garnishee promised and agreed to pay the sum of $800. This machinery was manufactured and delivered to the garnishee on April 16 or 17, 1895. About the same time the manufacturers of the machinery, the Gemlo Iron Works Company, presented a bill, made out in its own name, against the Shevlin-Carpenter Company for the $800, the purchase price for these rolls. The garnishee refused to recognize the Gemlo Iron Works in the transaction, stating that it did not know such works in the transaction, and only recognized the defendant Kilgore, with whom their dealings had been had. Thereupon an account was made out in favor of F. O. Kilgore, as follows:

[1] Reported in 67 N. W. 1017.

[2] Mitchell, J., absent, took no part.

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"Minneapolis, Minn., Mar. 30, 1895.

"Shevlin-Carpenter Co. In account with F. O. Kilgore, Dealer in Special Saw-Mill Machinery, Steam Shovels and Dredges, 106 Lumber Exchange.

"Terms.

"1 set steam press rolls..... $800

"Accepted June 25, 1895.

"Shevlin-Carpenter Co.
"J. H. Shevlin, Prest.

"Pay to Gemlo Iron-Works Co.

"F. O. Kilgore."

This order was delivered to the Shevlin-Carpenter Company on April 16 or 17, 1895, and retained by it, and the order never passed out of its possession. It made no objections to paying the order to the Gemlo Iron Works Company, as directed by Kilgore, except that it desired, before paying it, to test the working of the press rolls. These proved to be satisfactory, and it had them and the account and order in its possession at the time of the service upon it of the garnishee summons, viz. June 1, 1895. It did not formally accept the order until June 25, 1895.

The plaintiff, claiming that the defendants Kilgore and Lane were indebted to it in a sum exceeding $25, made an affidavit that the Shevlin-Carpenter Company was indebted to Kilgore, one of said defendants, and caused a garnishee summons to be served on it on June 1, 1895. The Gemlo Iron Works Company intervened, claiming that it was entitled to the whole indebtedness of $800, the purchase price for the rolls, which it had promised to pay Kilgore, and which it claimed by reason of having manufactured the rolls, and for which Kilgore had executed the order assigning the accounts which we have quoted at length. By stipulation of the parties it was agreed that the Gemlo Iron Works Company had a mechanic's lien for $450 of its claim on account of its manufacture of the rolls, and that it was entitled to this amount out of the $800. The contest is over the balance, viz. $350.

The plaintiff contends that the giving of the order by Kilgore to the Gemlo Iron Works Company did not operate as a sale or assignment of the debt, and in particular that it could not so operate until its acceptance by the Shevlin-Carpenter Company. The contention of the intervenor is to the contrary. All parties claiming any interest or right to the fund appeared in the proceeding. It is to be observed that the in-

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strument under consideration is an account made out by one party against another for furnishing material and doing work, and an order attached thereto by the party to whom it was payable, directing that the entire sum be paid to the manufacturer, who actually did the work and furnished the material. It was not a bill of exchange. We are of the opinion that this order operated as a valid assignment of the account or debt, although it was not formally accepted by the debtor before the company was garnished. The debtor was not only notified of this assignment several weeks before the garnishment, but received the account, with the order attached, and retained it, and its express assent thereto was not required in order to establish its liability to the Gemlo Iron Works Company. The Shevlin-Carpenter Company makes no defense upon the merits against the payment of the account, and it never had any such defense. It is ready and willing to pay the balance of $350 when the court shall decide which party is entitled to it. Its rights, as well as all others, are therefore protected. Kilgore has parted with his interest in the debt, and he could no longer maintain an action for it against the Shevlin-Carpenter Company for his own benefit. And as he had parted with his right and interest in the debt at the time of the garnishment, it results that plaintiff cannot maintain an action against the Shevlin-Carpenter Company, who were no longer indebted to Kilgore, but to the Gemlo Iron Works Company. See Conway v. Cutting, 51 N. H. 407. See, also, cases cited in notes on pages 15 and 16, 1 Daniel, Neg. Inst.

Order affirmed.

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JOHN A. SWAN v. ANNA MUNCH.

JOHN R. JOHNSON v. SAME.

JOHN HOTIN v. SAME.

CHARLES T. CARLSON v. SAME.

AUGUST C. CARLSON v. SAME.[1]

July 15, 1896.

Nos. 10,052, 10,053, 10,054, 10,055, 10,056—(258, 259, 260, 261, 262).

Water Rights—Adverse Possession—Continuous Use.

A wrongful entry upon land under a claim of right, inconsistent with the title of the true owner, with continued possession and the exercise of acts of ownership hostile to the rights of the owner, but without any pretense of paper title, may ripen into title by prescription. Village of Glencoe v. Wadsworth, 48 Minn. 402, followed. This rule applies to an easement in real property. And where the claimant needs the use of the property from time to time, and so uses it, this is a sufficiently continuous use to be adverse, although it is not constant. Rule applied in this case, and *held*, that the building of a dam across Snake river and the continued adverse use of the dam, whereby the water of the river was obstructed, and thereby overflowed plaintiff's land during the months of April, May, and June in each year, for the purpose of sluicing logs, for a period of fifteen years, was sufficient to create an easement in plaintiff's premises by prescription during the said three months in each year.

Five actions in the district court for Pine county. The cases were tried together, and at the close of the testimony defendant made a motion that the court instruct the jury to find for defendant in each case, which was denied. The jury rendered a verdict in each case in favor of plaintiff, in the sum of $190, $195, $125, $50, and $185, respectively. From an order, Crosby, J., denying a motion for a new trial in each case, on the ground that the verdict was not justified by the evidence, and was contrary to law, and because of errors of law occurring at the trial and duly excepted to, defendant appealed. Reversed.

Robertson Howard and *S. G. L. Roberts*, for appellant.

L. H. McKusick and *J. C. Nethaway*, for respondents.

[1] Reported in 67 N. W. 1022.

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BUCK, J. Five separate actions were brought by different plaintiffs, all against the same defendant, Munch, to recover damages caused by the overflowing of a portion of the lands owned by each of the respective plaintiffs by the operation of the Chengwatona sluicing dam on Snake river, which was originally built in 1849.

The material allegations in each complaint are as follows:

"That on or about the month of September, A. D. 1876, the defendant erected a dam to a great height across the Snake river, at the town of Chengwatona, in said county and state, and below the plaintiff's land above described, and ever since has kept the same up, and has thereby obstructed and stopped during all that time the natural flow of the water of said river, and raised it up in the bed of said river, and backed it up upon said land during the months of April, May, and June in each year, and at other times, injuring, destroying, and rendering said land unsuitable for agricultural purposes, for which said lands are chiefly adapted."

By reason of the facts alleged, each plaintiff claimed damages for the years 1891, 1892, 1893, 1894, and 1895. Defendant, in her answer, put in a general denial, and then alleged as follows:

"That the dam mentioned in the complaint was erected in the year 1849, and has ever since been maintained and operated; that said dam, for more than twenty years prior to 1890, and up to the present time, has been owned by her, and has been so maintained and operated by her; that during all of said time the waters of said Snake river have been raised by said dam and set back so as to cause that portion of the land described in the complaint which it is alleged therein has been injured by the operation of said dam to be continuously, uninterruptedly, adversely to the owners thereof, and under claim of right on part of defendant so to do, submerged and overflowed."

By stipulation the five cases were tried together, and a separate verdict was rendered in each case in favor of the plaintiff.

In the months of October and November, 1877, the dam had become rotten and was rebuilt, and substantial repairs were made upon it in 1887, considerable improvements made upon it in 1889, and the north wing rebuilt about the winter of 1894. More or less repairs were made upon the dam annually. The testimony on the part of the defendant showed quite conclusively that she or her predecessors have been in the open, visible, hostile, notorious, and continuous possession of the dam for more than 15 years prior to the commencement of this action, and that this condition applied to the

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portion of the premises of the different plaintiffs in controversy during the months of April, May, and June of each year during that period of time by reason of the natural flow of water in Snake river having been obstructed and stopped by the dam, which caused the water to overflow the natural channel of the river, and flow back upon the plaintiffs' lands, destroying the grass thereon growing, and rendering the land unfit for raising crops.

In the case of Dean v. Goddard, 55 Minn. 290, 291, 56 N. W. 1060, this court held:

"The intent to claim by adverse possession may be inferred from the nature of the occupancy, and the possessory acts necessary to constitute adverse possession depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. Actual residence upon the premises is not necessary, nor is it incumbent upon the adverse possessor to make oral declarations of his adverse claim. The mere fact that time may intervene between successive acts of occupancy while the party is temporarily absent engaged in business,—as in cutting logs to be sawed into lumber to be piled and stored on the premises by such party,—will not destroy his continuity of possession."

A wrongful entry upon land, with continued possession, without any pretense of paper title, but under a claim of right inconsistent with the title of the true owner, and the exercise of acts of possession hostile to his rights in the land, may ripen into title by prescription. Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377. Such use or adverse possession must be enjoyed by actual entry, and under such circumstances as will indicate that it is claimed as a matter of right. The true owner's rights must be invaded by such hostile acts as would constitute grounds for action against the adverse claimant or intruder, and under such circumstances as to make the possession appear to be for the benefit of the claimant. Is this doctrine applicable to an easement in real property, where the essential elements necessary to constitute adverse possession exist only three months in the year, and where during the other nine months of the year the premises are in the actual use and possession of the owner in fee? We answer this question in the affirmative.

During the months of April, May, and June in each recurring season there has been a continuous use of the premises by the defendant or her predecessors by overflowing them with water for the purpose

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of floating logs down the Snake river to the sawmills and to the markets of the country. Where the claimant needs the use of the easement from time to time, and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant. Cornwell Mnfg. Co. v. Swift, 89 Mich. 503, 50 N. W. 1001; Hisperia L. & W. Co. v. Rogers, 83 Cal. 10, 23 Pac. 196. It is evident that the building of this dam in 1849, and its use since then for raising water three months in each year for sluicing logs, indicates that such purpose was intended not to be temporary, but permanent, and is greatly for the benefit of the public in assisting it thus to have their logs conveyed from the great pine regions of the state to the mills and markets of the country. Its use for such purpose probably would not be either practicable or profitable more than the three months named, with each recurring year. It is a matter of public notoriety, as well as a matter of evidence in this case, that these great log drives are moved during the months named in each year, and to keep up this flow of water during this entire period would be useless to the public, and expensive to the defendant. Other than during the three months named, the plaintiffs have the use and benefit of the premises, and as the defendant uses it only when her needs and public necessity requires her to do so, this is a continuous use, and an omission to use it when not needed would not disprove a continuity of use, or defeat her right to an easement by prescription. The premises are situated several miles distant from the dam in question, and, notwithstanding their annual overflow by reason of the erection of the dam, none of the plaintiffs appear to have raised any objections thereto, but they seem to have acquiesced therein. They well knew of the hostile acts of the defendant, by thus overflowing their lands, who thus unmistakably indicated an assertion of right to enjoy the use of the premises, and the purpose for which it was so used. When defendant assumed possession and use of the premises the plaintiffs would stop using it, and only resume its use when defendant's occupancy again ceased. There was no trick or artifice on the part of the defendant, but an open and notorious taking possession of the premises by the defendant for her use and needs, and whereby the public were also benefited. These acts were notice to the owners that defendant was occupying the premises under a claim of right.

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When there has been a continuous use of an easement for 20 years, unexplained, it will be presumed to have been under a claim of right, and adverse, and will be sufficient to establish a right by prescription, and authorize the presumption of a grant, unless contradicted or explained. Washburn, Easem. (4th Ed.) p. 156, § 31, and cases cited in note 5. Carmody v. Mulrooney, 87 Wis. 552, 58 N. W. 1109. Under the laws of this state the 20-years use has been changed to 15.[2] There was no controversy as to the use of the premises by the defendant for the period of 15 years, she using them when she saw fit during the three months named, without asking leave of the plaintiffs, and without objection; and such uninterrupted enjoyment for that period gives a title or easement by adverse possession for the three months each year. If there was any serious question whether the claimant entered upon the property under claim of right or title with intent to oust the owner, that question would doubtless have to be submitted to the jury. But the actual entry and continuous use of the premises by defendant for a period of 15 years were admitted or conclusively proven. The plaintiffs contend that defendant's entry was tortious, and therefore could not be under claim of right; but, as we have already stated, this is immaterial. There was no evidence introduced which tended to rebut the presumption arising from the 15-years use of the premises by defendant that she was in possession and so using it under a claim of right and adversely; hence there was no controverted question of fact upon this point to be submitted to the jury.

Order reversed.

[2] Laws 1889, c. 91, § 1.

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DANIEL EGAN v. NELLIE GORDON and Others.[1]

July 16, 1896.

Nos. 9916—(152).

Action for Rent—Guaranty—Fraud—Pleading.

In an action to recover on a guaranty of the payment of rent, the first defense in the answer, stating that defendant was induced by the representations and artifices alleged to sign the guaranty on the lease, supposing he was merely witnessing the lease, *held* sufficient.

Same—Evidence—Interest of Guarantor.

Held, it was competent, or at most error without prejudice, to permit the alleged guarantor to prove that he had no interest in the lease or in the business carried on upon the leased premises.

Same—House of Ill Fame—Reputation.

The second defense in the answer was that the plaintiff leased the premises to the lessee with the knowledge and under the agreement and understanding that they were to be used as a house of ill fame, and were so used with the plaintiff's consent. *Held*, evidence of the reputation of the place among the neighbors was competent, on such an issue, to prove that it was a house of ill fame.

Same—Reputation before Lease.

The lessee occupied the premises, and apparently carried on the same business upon them, both before and after the execution of the lease. *Held*, evidence of the reputation of the place as a house of ill fame before the lease was executed, but while she occupied it, was competent.

Same—Acts Showing Character of House.

Held, also, that evidence of acts done on the premises tending to show that the place was in fact such a house, was competent to prove the character of the house, though plaintiff was absent when the acts were done.

Same—Reputation after Lease.

Under the circumstances, evidence of the reputation of the house after the execution of the lease was competent.

Verdict Sustained.

Held, the verdict is sustained by the evidence.

Appeal by plaintiff from an order of the district court for Hennepin county, Jamison, J., denying a motion for a new trial, after a verdict in favor of defendants Gavin and Eggleston. Affirmed.

[1] Reported in 68 N. W. 103.

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George R. Robinson, for appellant.
Wm. H. Donahue, for respondent Gavin.

CANTY, J. This is an action for the recovery of rent, brought by the lessor against the defendant Gordon as lessee and against the other defendants as guarantors of the payment of the rent. Defendants had a verdict, and from an order denying a new trial plaintiff appeals.

1. The lease is dated August 1, 1894. Defendant Gavin, in his answer, alleges as a first defense that at the time the lease was made he signed it as a witness at the request of the husband of the lessee; that afterwards, about August 30 of the same year,

"Plaintiff herein presented said lease to defendant herein in a folded form, and at said time informed defendant that he had not signed his name in the proper place, and at said time designated to defendant herein the place where he should sign his name as a witness to said lease, which defendant then and there did, without reading said lease"; that plaintiff conspired with said husband of the lessee "in the making of said false and fraudulent representations for the purpose of inducing defendant herein to sign his name to the guaranty written on the back of said lease; * * * that defendant herein did rely on and believe in said false pretenses and representations, and, so relying and believing, did sign his name as aforesaid, and not otherwise, and that at no time did defendant herein have any knowledge of the contents of said lease when he signed his name on the back thereof, but at all times believed and supposed, and by the alleged representations of plaintiff and said N. C. Gordon was led to believe, that he only signed his name as a witness."

On the trial, defendant Gavin offered evidence in support of this defense, and plaintiff objected on the ground that the answer does not state any false or fraudulent representation, concealment, or deceit on the part of plaintiff. The objection was overruled, and this is assigned as error. We are of the opinion that the allegations of the answer are sufficient in this respect.

2. It was competent, or at most error without prejudice, to permit Gavin to prove that he had no interest in the lease or business carried on upon the leased premises, as this tended to show that in fact his relation was what it appeared to be, merely that of guarantor for the accommodation of the lessee.

3. The second defense set up in the answer is that plaintiff leased the premises to the lessee with the knowledge and under the agreement

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and understanding that she was to use them as a house of ill fame, and that during all the time she occupied them she did so use them. We are of the opinion that evidence of the reputation of the house among the neighbors is competent, in such a case as this, to prove that it is a house of ill fame.

4. The court permitted evidence to be given of the reputation of the leased premises as a house of ill fame for some time immediately prior to the date of the lease, and this is assigned as error. We are of the opinion that the evidence was competent. It appeared that this same lessee had occupied the premises during all of the time, and that she and the other occupants had apparently used the premises for the same purpose prior to the making of the lease in question, as afterwards.

5. Evidence of specific acts done on the premises, tending to show that the place was a house of ill fame, was also competent, though plaintiff was not present at the time, and no knowledge of the particular acts was brought home to him. It was necessary for defendant to prove (1) that the place was a house of ill fame, and (2) that plaintiff had knowledge of that fact when he made a new lease continuing the tenancy. But in proving the latter fact it was not necessary to show that plaintiff had knowledge of every such act given in evidence to prove the former fact.

6. The court did not err in refusing to charge the jury "that evidence of such use of the property subsequent to the execution of the lease is no evidence against the plaintiff." As before stated, there was evidence tending to prove that the same parties occupied and used the premises in the same general way both before and after the execution of the written lease. Then evidence that it was a house of ill fame after the execution of the lease tended to throw light on what it was at and before that time.

7. We are also of the opinion that the evidence sustains the verdict.

This disposes of the case, and the order appealed from is affirmed.

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EDWARD S. BROWN v. UNION DEPOT STREET RAILWAY & TRANSFER COMPANY OF STILLWATER and Another.[1]

July 17, 1896.

Nos. 9850—(76).

Mortgagee—Failure to Assert Lien—Estoppel by Silence.

Upon the facts in this case, it is *held* that plaintiff, by his acts or silence when he should have spoken, during the pendency of certain proceedings under G. S. 1894, c. 76, intentionally, or by his culpable negligence, induced another party to purchase property at a receiver's sale, in good faith and in the belief that a certain mortgage lien on a part of the property had been or would be extinguished by such sale, and as against good-faith purchasers from said party, and subsequent incumbrancers, cannot now be heard to deny that the mortgage lien was extinguished by the sale, in an action to foreclose said mortgage as the equitable owner of the same.

Action in the district court for Washington county to foreclose a mortgage. E. S. Buffington, as receiver of the Stillwater Union Depot & Transfer Company, the Massachusetts Loan & Trust Company, and the Stillwater Union Depot & Transfer Company, intervened. The case was tried before Williston, J., who found in favor of intervenors. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Fayette Marsh, for appellant.

Davis, Kellogg & Severance, for respondents.

COLLINS, J.[2] In 1885 the Union Depot Street Railway & Transfer Company of Stillwater, a corporation, was indebted to various persons in the sum of $42,920. Of this sum, $29,670 was due to the holders of overdue interest coupons upon bonds which were already secured by the trust deed, hereinafter mentioned, of other property belonging to the corporation. One of these creditors, to the extent of $3,250, was this plaintiff, then president of the corporation.

At a meeting of the board of directors it was resolved that the president and secretary of the corporation execute and deliver to one O. D. Baldwin nine promissory notes, in different specified amounts, but representing the total indebtedness as above stated, each paya-

[1] Reported in 68 N. W. 107.

[2] Mitchell, J., did not sit.

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ble to the order of said Baldwin, and also execute and deliver to him a mortgage upon certain real property belonging to the company to secure the payment of said notes. This was done, and the mortgage, which accurately described each note, placed upon record. The mortgage was in the usual form, Baldwin being named as mortgagee; and there was nothing about it indicating that he held the notes or the mortgage in trust for any person, or that he was acting in a fiduciary capacity in any way. Among the notes, the first one mentioned in the mortgage, and the first to become due, according to its terms, was one for the sum of $3,250; and it seems to be conceded that this was plaintiff's property, Baldwin holding it in trust merely.

A very few days after this transaction, proceedings were had under G. S. 1894, c. 76, whereby a receiver was appointed for the corporation, and its property placed in his hands. This was known to plaintiff. September 1, 1885, some four months after the note for $3,250 matured, Baldwin intervened in the receivership proceedings, by filing a complaint setting forth the execution and delivery of eight promissory notes, specifically describing each; alleging that he was the owner thereof, and that he had no security except the mortgage before referred to. No mention was made of the note for $3,250 in this complaint. His prayer for relief was that he might exhibit his claims, and be permitted to share in the benefits of a general judgment to be entered in the proceedings.

March 5, 1888, upon due notice to all creditors of the insolvent corporation, and without objection, the court entered a decree in which was recited the fact that a trust deed covered a large portion of property belonging to the corporation, that the balance of its real estate was included in the Baldwin mortgage, that he had intervened, that the court had acquired jurisdiction of all parties to the action, and the subject-matter, and that all parties consented thereto; ordering and adjudging that all of the insolvent's estate be sold as one parcel or property, at not less than $100,000, free and clear of all liens of every nature, and of every creditor who had intervened, and that such liens stand against the proceeds of the sale, in lieu of the property itself. The decree recited, and it is not disputed, that at the hearing plaintiff was present, by his attorney, as the receiver of one of the creditors. Pursuant to the terms of this decree, a sale was made, and the property sold in one parcel to one Prince for the

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sum of $100,000. The court found that plaintiff was present at, and knew of, the sale, and also knew of the confirmation of the sale, by order of the court, May 1, 1888. This order provided for the making of a deed by the receiver, conveying the property free and clear of all liens, incumbrances, and demands held by creditors, stockholders, or any other party who had intervened.

A deed was made as ordered, and immediately thereafter Prince, the purchaser, sold and conveyed the entire property to the Stillwater Union Depot & Transfer Company. It issued bonds in a large sum, secured by a trust deed of its entire property, and these bonds have passed into the hands of various purchasers of the same. A receiver was subsequently appointed for its property, and said receiver and the trustee under the trust deed are the intervenors in this action.

It was stipulated on the trial that the intervenors, as well as the holders of the bonds, had no notice or knowledge of the existence of the note for $3,250, or of the Baldwin mortgage, except such notice or knowledge as might have been obtained by an examination of the records and files in the public offices, and such further notice or knowledge as they would have had, in the exercise of a reasonable diligence, after an examination of such records and files. From the time of the sale down to the day of the trial of this action, the Stillwater Union Depot & Transfer Company and its receiver remained in possession of all of this property, and carried on the business.

It appears that, very soon after the execution and delivery of this note for $3,250, it was indorsed without recourse by Mr. Baldwin to plaintiff, and delivered to another person for him. This person had agreed with plaintiff to procure the money thereon for him, but failed to do so, and in 1892 it was found among his papers, and then for the first time actually placed in plaintiff's possession. He brought this action in 1893, alleging the payment of all of the mortgage notes except the one just mentioned, and, claiming to be the equitable owner of the mortgage, demanded its foreclosure by a sale of the mortgaged premises for the satisfaction of the amount due upon the note, with costs and disbursements. The court below, upon its findings of fact, ordered judgment in favor of the intervenors, and plaintiff appeals from an order denying a new trial.

The order must be affirmed.

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The plaintiff, as president of the original corporation, had joined in the execution of a mortgage in which Baldwin was named as mortgagee, to secure this note and other like obligations. There was nothing whatever in the mortgage, and consequently nothing upon record, which would indicate that the secured notes, although payable to Baldwin, were, with the security itself, held in trust; nor was there anything about the transaction or the records which would suggest to the most cautious man that a secret trust existed. The plaintiff had himself, and by his own formal act, placed his claim in the hands of Baldwin, to deal with it as he chose, and had given him full power to treat it and the security as his own. This was made a matter of public record, and the public thus advised of it, without an intimation that a trust existed, or that plaintiff was a real party in interest.

When the time came for Baldwin to intervene in the proceedings, under chapter 76, he did so, still withholding from the public the fact that he held the security in trust for plaintiff and others. He filed a complaint in intervention, stating his claims under the mortgage to amount to $39,670, exclusive of interest, describing all of the notes except that now in question, which, as before stated, was the first mentioned in the mortgage, and was some time past due; exhibiting the mortgage as his property, but not referring to this note in any manner. From what appeared, it could not be presumed that it actually belonged to another party, or that it had been transferred by the mortgagee. Taking into consideration the fact that the note was long past due, the presumption would be, as was said by the court below, that it no longer existed as an indebtedness secured by the mortgage. If the mortgagee appeared to have elected to treat the note as no longer secured by the mortgage, or as no longer in existence as a debt, it is to be borne in mind that the plaintiff had previously, and without any restriction, so far as was known by the public, conferred upon him the authority so to do.

Again, it was shown that plaintiff had actual notice of the appointment of a receiver; that he had knowledge of the subsequent proceedings; that, as the receiver of another creditor, he was cited in, and, by his attorney, appeared upon the hearing of an order to show cause why the decree actually entered should not be made, whereby it was adjudged that the estate should be sold as one property, free and clear of all liens and incumbrances, including the Bald-

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win mortgage; that he knew of the decree, was present at and knew of the sale under the decree, and, shortly after the making of the order of the court confirming such sale, was informed of it. He did not deny that he had notice and knowledge of all of these things, nor did he attempt to show that he ever made any objection to the proceedings had, or the manner in which they were conducted, or asserted any claim under the mortgage prior to 1893, when he brought this action, some five or six years after these intervenors had acquired their rights, relying upon what appeared of record and on file in the public offices.

If he was the owner and holder of the note before maturity, it would seem strange that he was not heard from at some time before the sale. His silence when he should have spoken can only be explained upon the theory that he relied upon receiving his money from the person to whom it appears he intrusted the note, with the assurance from him that the amount thereof should be forthcoming. If the note had not been indorsed to him by Baldwin when the latter intervened, the duty still devolved upon him to see that his interests were not sacrificed by the party in whose care he had absolutely and unqualifiedly placed them. Baldwin had the legal title to the mortgage. If he had foreclosed for the amount due on the eight notes which he presented in his claim in intervention, omitting to make any claim of indebtedness on the note for $3,250, would the plaintiff be heard, as against purchasers of the premises in good faith, to assert that, with full knowledge of the transaction, he still retained a lien on the same to the extent of the amount due on his note? Certainly he would not, for the purchasers would be protected against any equitable claim of the plaintiff to the mortgaged premises. See Solberg v. Wright, 33 Minn. 224, 22 N. W. 381. And, in principle, such a case would be identical with that at bar.

Further than this, Baldwin represented the plaintiff when he intervened in the receivership proceedings. The court, the receiver, and the public had been authorized, as well as invited, to deal with him as the absolute owner of the mortgagee; and, so far as was known, he was the only person who had any interest, legal or equitable, in it. Upon what ground can plaintiff now say that Baldwin did not and could not represent him,—especially in view of the fact that he knew just what was being done in the way of selling the property free and

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clear of the mortgage lien? The court had the power, having acquired jurisdiction of the lienholders, to decree the sale in question, and the only remedy of such holders was by appeal from the decree itself. The plaintiff, represented as he was by his chosen trustee, could not even attack that decree by an appeal from the order of confirmation. This was settled in Hospes v. Northwestern M. & C. Co., 41 Minn. 256, 43 N. W. 180. See, also, Nelson v. Jenks, 51 Minn. 108, 52 N. W. 1081, wherein the same sale was under consideration.

To sum it all up, the plaintiff is conclusively bound by his own conduct in remaining silent when it was his duty to apprise the purchaser at the sale of his claim, if he had one, and is barred from now asserting a right to foreclose as an equitable owner of the mortgage, and as against those who have in good faith relied upon his failure to act when the circumstances required him to speak out. He conceded a material fact by his silence; he had knowledge of what was being done; the court, the receiver, the purchaser at the sale, and his successors in interest, were induced to purchase because of plaintiff's failure to assert a claim; and it is fair to infer that his silence was intentional, from the fact that he remained silent when he should have been heard, and, after the intervenors have for many years acted upon a belief that the lien of the mortgage was duly extinguished by the sale, attempts to enforce payment of the note. If his silence was not intentional, he was certainly culpably negligent. An estoppel in pais arises when one by his acts or representations, or silence when he should speak out, intentionally or by culpable negligence, induces another to believe that certain facts exist, and such other rightfully acts on the belief so induced, and will be prejudiced by permitting the party to deny the existence of such facts. That this is a case for the application of this doctrine is strikingly apparent.

Order affirmed.

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GREAT NORTHERN RAILWAY COMPANY v. S. STEWART.[1]

July 17, 1896.

Nos. 9865—(143).

Action in the district court for Stevens county. The case was tried before C. L. Brown, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

M. D. Grover and *Cyrus Wellington*, for appellant.

Clapp & Macartney, for respondent.

PER CURIAM.[2] The four members of the court who heard the argument of this case are equally divided in opinion on the question whether the order appealed from should be reversed or affirmed. As the action is one for the recovery of real property, and the appellant may secure a second trial by complying with the statute,[3] we deem it inexpedient to order a reargument, or to state our personal opinion upon the questions presented by the record. The result is that the order of the district court denying appellant's motion for a new trial must be affirmed.

So ordered.

[1] Reported in 68 N. W. 1102.

[2] Mitchell, J., absent, took no part.

[3] G. S. 1894, § 5845.

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S. STEWART v. GREAT NORTHERN RAILWAY COMPANY.[1]

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July 17, 1896.

Nos. 9902—(178).

Grain Elevators—Laws 1893, c. 64—Constitution.

Held, that Laws 1893, c. 64 (G. S. 1894, §§ 7724–7729), entitled "An act providing for the erection of public grain warehouses and grain elevators on or near the right of way of railways, and providing for condemnation proceedings in connection therewith," is constitutional.

Same—Right to Maintain Elevator—Who may Exercise.

Held, further, that this statute authorizes a party who has erected a public elevator, and is operating it, on the site sought to be condemned, under a license from the railway company which has been revoked to take effect in the near future, to acquire the right and easement, to continue for a fixed term, to maintain and operate a public elevator on such site.

Same—Damages—Evidence.

Held, that there was competent evidence in this case for the consideration of the jury on the question of damages for the taking of such easement.

Petition in the district court for Stevens county for the purpose of acquiring the right, privilege, and easement of erecting and operating a public grain elevator on a site on the right of way of respondent railway company. The petition came on for hearing and assessment of damages before C. L. Brown, J., and a jury. The jury assessed the rental and compensation for the lands sought to be taken at one dollar per year, and in gross for the full term of 20 years at $20, and the findings and order of the court were in favor of petitioner, and from a judgment entered in pursuance thereof respondent appealed. Affirmed.

M. D. Grover and *Cyrus Wellington*, for appellant.

Clapp & Macartney, for respondent.

START, C. J.[2] The petitioner (the respondent herein), for the purpose of acquiring the right, privilege, and easement of erecting and operating a public grain elevator for the public, for hire, upon a site on the right of way of the appellant railway company, presented to

[1] Reported in 68 N. W. 208.

[2] Mitchell, J., absent, took no part.

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it an application therefor on June 7, 1894. The application was denied, and thereupon the petitioner, on June 29, 1894, presented to the district court his petition for condemnation of such right and easement, under the provisions of Laws 1893, c. 64 (G. S. 1894, §§ 7724–7729). Such proceedings were had upon such petition that on November 30, 1895, judgment was entered in the district court to the effect that the petitioner was entitled to the privilege and easement sought. The railway company appealed from the judgment.

1. The first and controlling question presented by the record for our consideration is the constitutionality of Laws 1893, c. 64, which is entitled "An act providing for the erection of public grain warehouses and grain elevators on or near the right of way of railways, and providing for condemnation proceedings in connection therewith."

The material provisions of the statute may be summarized as follows:

Section 1 provides that any person or corporation desirous of erecting and operating, at or contiguous to any railway station or siding, a warehouse or elevator for the purchase, sale, shipment, or storage of grain for the public, for hire, may make application for a site therefor, containing a description of that part of the right of way of the railway desired for such purpose, to the party owning, leasing, or operating the railway, for the right, privilege, and easement of erecting and maintaining such warehouse or elevator upon the right of way at such station or siding within the outside switches of the yard of such railway station or siding, upon paying a reasonable compensation for such privilege.

Section 2 requires the applicant to state in his application the amount which he deems such reasonable compensation, and make a tender thereof; and, in case such application is denied by the party to whom it is presented, such compensation shall be assessed by proceedings in the district court.

Sections 3 and 4 prescribe the procedure to be followed in the district court as to the filing of the petition, notice to the railway company, trial, verdict of the jury, and judgment.

Section 5 provides that all elevators or warehouses erected and maintained under the provisions of this act shall be deemed public elevators and public warehouses, shall be subject to legislative control,

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shall be kept open for business for the public, for reasonable business hours, from September 15 in each calendar year to January 15 in each succeeding calendar year, and that any person, firm, or corporation failing to comply with the provisions of the act shall forfeit the rights, privileges, and easements acquired.

Section 6: Parties availing themselves of the act shall within 60 days after the amount to be paid for the easement is finally determined, by agreement or by proceedings in court, commence the erection of the warehouse or elevator stated in the application, and complete the same within 90 days, or the right shall be deemed to have been abandoned.

The appellant claims that the use for which the land may be taken by virtue of this statute is not a public use. If such is the case, it is unconstitutional, for lands can only be acquired by the exercise of the power of eminent domain for a public use or purpose. What is a public use is a judicial, not a legislative, question; but, if the use is public, the propriety of authorizing the exercise of the power of eminent domain in a particular case is exclusively a legislative question. The term "public use" is flexible, and cannot be limited to the public use known at the time of the forming of the constitution. Any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities would be a public use. Mills, Em. Dom. § 21.

The methods of transportation and trade customs relating to the handling, selling, and transporting of the products of this and other grain-growing states render grain elevators a practical necessity in the transfer of grain from the producer to the railway cars by which it is carried to the consumer. They are connecting links in the chain of transportation between the farmers' wagons and the railway cars. Their use in facilitating the handling, storage, and transportation of the products of the state is a public use, and subject to legislative regulation and control. Rippe v. Becker, 56 Minn. 100, 57 N. W. 331; Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857. The use to which grain elevators for facilitating the transportation of the products of the state are devoted being a public use, the legislature may authorize the exercise of the power of

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eminent domain in aid of such use. Gurney v. Minneapolis Union E. Co., 63 Minn. 70, 65 N. W. 136.

We do not understand that the appellant seriously controverts this proposition. Its claim is that the statute authorizes the party seeking the condemnation of land for an elevator site to use it, at his option, either for the purchase, or for the sale, or for the shipment of grain, or for the purpose of storing grain for the public for hire; that he may use the elevator exclusively for the purchase and sale of grain on his own account, at his option; that he may or may not use it for the storage of grain for the public for hire. If this is the proper construction of the statute, if it is optional with the party whether he will use his elevator exclusively for his own private grain business or for the public purpose of facilitating the marketing and transporting of the products of the state, the statute cannot be sustained. It would be unconstitutional, for the reason that it authorizes a party to exercise the power of eminent domain for a public or private use, at his option. Where one construction of a statute will make it void for conflict with the constitution, and another would render it valid, the latter, if not a forced and unreasonable one, will be adopted, although the former, at first view, is otherwise the more natural interpretation of the language used.

The contention of the appellant requires us to construe the words of this statute, "for the purchase, sale, shipment or storage of grain for the public for hire," so as to limit the qualifying words, "for the public for hire," to the storage of grain. Upon a first casual reading of the statute, we were inclined to the view that this was the natural interpretation of the language used. But upon reading these words in connection with the title of the act, which declares that the purpose of the statute is to provide for public grain warehouses and elevators, and for condemnation proceedings in connection therewith, and also in connection with section 5 of the act, declaring all warehouses and elevators erected and maintained under the provisions of the act to be public, and subject to legislative control, we are of the opinion that the statute does not purport to authorize the condemnation of an elevator site for the purpose of carrying on an exclusively private business of buying and selling grain at the option of the party attempting to exercise the power of eminent

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domain to acquire such site; and, further, that it was not the intention of the legislature by this act to authorize a party to acquire a site for an elevator, to enable him, at his option, to use it as a public elevator or exclusively as an instrumentality in his own private grain business; and that it has not done so.

When the statute is construed with reference to its title, and the abuses that it was intended to correct, and effect is given to all of the provisions of the statute, it is quite clear that the only construction which can be fairly and reasonably given to it is one in harmony with the constitution, viz. that the party is only authorized to acquire the right and easement for the purpose of operating a public warehouse or elevator for hire, for the public, for the purchase, sale, shipment, or storage of grain; that is, the party is authorized to acquire the easement for operating an elevator, not to enable himself to purchase, sell, and ship grain to the exclusion of the public, but to enable him to operate a public elevator for hire, to enable the public to use the elevator as an instrumentality for the purchase, sale, shipment, or storage of grain. The words of the statute, "for the public for hire," qualify not alone the words "storage of grain," but the words "purchase, sale and shipment" as well. The elevator for which a party is authorized to acquire a site under this statute is a public one, which the public—that is, all persons having occasion to do so—have the right, without discrimination, on equal terms and for reasonable charges to use, to enable them to purchase, sell, ship, or store grain. To illustrate. A farmer may wish to ship his grain by the car load, on his own account, and to do so economically it is necessary that he should have the right to secure elevator facilities at reasonable rates, and without discrimination, to enable him to handle, store, and ship his grain. Again, a man of limited means, having no elevator, may desire to engage in the grain business, but to do so he must have elevator facilities on equal terms with other dealers.

Now, to secure the building and operating of public elevators, to enable the farmer, the dealer, and the public generally to secure the necessary facilities for the purchase, sale, shipment, or storage of grain, and to prevent abuses and monopoly in the grain business, is the purpose of this statute. The use for which it authorizes the easement to be acquired is, therefore, public.

The petition and judgment in this case follow the letter of the stat-

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ute, and the easement acquired by the petitioner by these proceedings is the right to operate a public elevator on the right of way of the appellant, and the petitioner's testimony on the trial as to what he intended to use the elevator for is not material. His intentions in the premises cannot enlarge the easement, or affect the decision of the question whether the statute authorizes the taking of land for other than a public purpose at the option of the party seeking to condemn a site for an elevator.

It is further claimed that this statute is class legislation, and denies to railroad companies the equal protection of the laws, for the reason that it authorizes the condemnation of a site for warehouses or elevators on their right of way, but does not subject the land of a private owner to a like burden.

It is difficult to see how any question of class or partial legislation can arise under this statute, for it is not the railway companies which are discriminated against, but the party seeking to condemn a site for an elevator is limited in his selection. The selected site must be at or contiguous to the railway station or siding, and between the outside switches of the yard. This limitation is not a favor to the party seeking a site, or a discrimination against the railway, but it is a limitation imposed for the benefit of the public, and is intended to secure the location of public grain elevators at such points that they can readily be connected by side tracks with the main track of the railway, so as to furnish convenient facilities to the public for economically handling and shipping the products of the state. The statute applies to all railway companies and to all land similarly situated, and is not class or partial legislation. The legislature, in its wisdom, has by this statute designated the property which it deemed appropriate for the maintaining of public elevators thereon, and has accordingly authorized its condemnation. The necessity or expediency of thus appropriating this particular property, and none other, is not a subject of judicial cognizance.

The appellant further claims that the statute is invalid, because the party seeking to condemn an elevator site is given the exclusive right of selection within the limitations of the statute, and the railway company is not given any right to submit to the court the question whether the taking of the particular piece of ground sought is necessary for a public use. We have no doubt that the party seeking to

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acquire a site under this statute must act in good faith, and, if it was manifest to the court from his selection that he was acting in bad faith, and seeking to make use of the statute simply to oppress or blackmail the railway company by unnecessarily selecting as a site for his elevator the ground on which its station buildings were located, the court would have the power to prevent any fraudulent use of the statute. But, this aside, it is a question for the legislature whether property already appropriated to a given public use shall be taken for another public use.

"There is nothing better settled than that, the power of eminent domain being an incident of sovereignty, the time, manner, and occasion of its exercise are wholly in the control of the legislature, except as restrained by the constitution."

If the use is public, the necessity or expediency of appropriating any particular property is not for the courts. Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325. The statute in question is a valid exercise of legislative power.

2. It appears from the petition, answer, and evidence in this case that the appellant is the lessee of the St. Paul, Minneapolis & Manitoba Railway Company, for the term of 99 years, of the land and right of way here in question. The appellant now claims that there is a defect of parties, because the Manitoba Company may have, during the period of 20 years—the term of the easement sought to be acquired in this case—an interest in the subject-matter of the condemnation proceedings, and should have been made a party thereto. No such interest appears on the face of the petition, or is alleged in the answer. The appellant cannot now raise the objection of a defect of parties, for such defect, if any there be, can only be taken advantage of by demurrer or answer; otherwise it is waived. Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261, 276, 585.

3. The trial court found as a fact that on or about October 1, 1891, the petitioner, by the permission and license of the appellant, erected upon the tract of land so sought to be condemned by this proceeding a complete grain elevator of about 40,000 bushels capacity, and has at all times maintained and operated such elevator thereon, and for the right, privilege, and easement of continuing so to maintain the same on such tract of land the condemnation proceedings herein were instituted. The court further found that the petitioner did not in-

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tend to erect any other elevator on the land occupied by his elevator already in existence, and that the license under which the petitioner erected his elevator terminated July 15, 1894. It further appeared from the undisputed evidence that the elevator so operated by the petitioner was licensed as a public elevator under the laws of this state, and that he is still in the possession of the elevator and land on which it stands, but that prior to the filing of his petition herein he was notified by the appellant to remove his elevator from such tract within six months after such notice.

The appellant claims substantially that the statute relates only to the acquisition of a right to erect, and not of a right to continue to operate, an elevator which had been erected and was on the land at the time of the filing of the petition; hence under the undisputed evidence and the finding of fact the petitioner could not maintain these proceedings. The statute must receive a reasonable construction, and a mere statement of the facts in this case is all that is necessary to show that the construction claimed by defendant is extremely technical, and without merit. It is undisputed that on June 7, 1894, the petitioner owned the elevator in question, and whether he was in possession of the land under a verbal license without conditions, except what the law would imply as to the removal of his elevator, or under a special lease containing special conditions as to such removal, as claimed by the appellant, he then had the right to remove it. But he then knew that he could not continue to operate the elevator unless he acquired the right to do so under the statute. Now, if he had torn the elevator down, or moved it off the right of way, and then filed his petition, and, when he had acquired the right to operate it on its former site, he had erected or removed it upon the site, his proceedings would have been literally in accordance with the statute.

There is no warrant for the assumption that, if the petitioner could not have acquired the right to operate the elevator upon the location sought, he would not have removed his elevator before his right to the possession of the site ceased, or before he surrendered possession thereof. When the petition was filed, and the order of the court made thereon and served on the appellant, it had no right to or claim on the elevator, and the petitioner's right to remove it was still absolute. It is manifest that, except for the right given the petitioner to

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acquire a site for his elevator, he would remove it while he had a right so to do, and not forfeit it to the appellant; hence there is no basis for the claim that the appellant would secure and operate the elevator when the petitioner was forced to vacate the site, and that the public gains nothing by the condemnation proceedings. The petitioner's condemnation proceedings were not an attempt to condemn property already in use for the very purpose for which condemnation was sought, for such use would cease, except for the condemnation proceedings; and the case of Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co., 61 Minn. 502, 63 N. W. 1035, has no application to this case.

The object sought by the petitioner was to acquire the right to continue to operate his elevator on its then site, and his petition and proceedings were within the spirit, and in form with the letter, of the statute, and his rights cannot be defeated because the evidence shows that the right he seeks is to continue the use of his elevator, instead of a right to pull it down and put it up again. The law does not require a party to do a useless and foolish thing. He was not bound to take down or remove his elevator, and, when he had secured the easement sought, erect it on the location acquired. The trial court did not find that the petitioner erected the elevator under the special permit or lease containing conditions as to the removal of the buildings, as claimed by appellant, but that he erected the elevator by the permission and license of the appellant. The sufficiency of the evidence to support this particular finding is not raised by any proper assignment of error.

4. The last assignment of error urged by appellant in its brief is that no competent evidence was introduced to enable the jury to assess the damages; that is, either the annual or the gross rental value of the premises. This claim is not sustained by the record.

The appellant offered no evidence on the question, and by no assignment of error is the sufficiency of the damages awarded questioned. Upon this question the petitioner testified that he had experience in the renting of sites for elevators from railroad companies, and knew the rental value of the site in question, and, without any objection being made as to his competency, he testified as to annual rental value and the gross rental value of the site for 20 years. Other witnesses gave similar testimony, but their competency

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was challenged by proper objections and exceptions; but the rulings of the court in receiving the evidence are not assigned as error. Each of the witnesses, including the petitioner, stated on cross-examination, in effect, that his opinion was based on what the railroad companies were accustomed to charge as rental for similar sites, and that one of the matters taken into consideration by the companies in fixing the annual rent was the benefits they would secure from the business of the elevator. We are of the opinion that the value of this evidence was for the jury, and that it sustains the award of damages.

Judgment affirmed.

CANTY, J. I concur in the foregoing opinion, but my reason for holding that the statute is not class legislation, and therefore unconstitutional, because it authorizes only the condemnation of the railway right of way for a site for the elevator, and does not authorize the condemnation of private property adjoining the right of way, which private property is sometimes equally as available as an elevator site, is as follows: The legislature has undoubted constitutional power to give the petitioner a right to select either a site on the right of way or on private property (Cooley, Const. Law [5th Ed.] 668), and the constitutional provision was not intended to prohibit this. If the legislature has the power to delegate to the petitioner the right to select the right of way, it must have the power to make the selection itself, as the power is peculiarly a legislative one. The fountain cannot rise higher than its source. The delegated power cannot be greater than the source of that power. It is clearly, then, a case where the clause of the constitution prohibiting class legislation does not apply.

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C. A. KIPP v. GEORGE H. ELWELL.[1]

July 17, 1896.

Nos. 9908—(211).

Constitution—Collection of Outlawed Taxes—Laws 1893, c. 150.

In so far as Laws 1893, c. 150, undertook to confer jurisdiction upon the district court to proceed as against lands upon which the state had lost its lien for taxes, and had no color of right to enforce collection thereof, it was unconstitutional, because not due process of law.

Action in the district court for Anoka county to determine the adverse claim of defendant to certain land. Plaintiff based her title on a sale made October 12, 1893, under a judgment in proceedings to enforce payment of taxes by virtue of Laws 1893, c. 150. The case was tried before Smith, J., who found as facts substantially as follows:

(1) That on and prior to October 12, 1893, defendant was owner in fee of an undivided half of the land, and that he became the owner thereof in 1892; that prior to that time the land was owned by Pace and Mortin, and was assessed in their name from 1857 to 1880, inclusive; that taxes were levied and extended against the land for each of said years, and were not paid, but became delinquent from year to year, and forfeited to the state, and that said taxes for 1880 were $5.82.

(2) That August 12, 1881, pursuant to Laws 1881, c. 135, judgment was duly entered against the land, adjudging it liable for taxes for said several years to the amount of $450.31, which sum included taxes for 1880; said judgment declaring said sum a lien on the premises; and directing the same to be sold unless payment thereof should be made, as provided by statute.

(3) That the sum was not paid, and the premises were duly advertised for sale to pay said taxes, but were not sold to a purchaser, nor was any record made, or evidence given, that the premises were bid in for the state, or offered for sale. That the premises were there-

[1] Reported in 68 N. W. 105.

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after stricken from the tax list, and no part thereof had since been assessed for taxation, nor had any tax been levied or paid thereon, until the purchase thereof by the plaintiff, as hereinafter stated.

(4) That in pursuance of Laws 1893, c. 150, on September 12, 1893, in proceedings to enforce the payment of taxes delinquent, after due notice, judgment was entered against the land, adjudging that it was liable for taxes in the sum of $992.95, and that said amount was a lien thereon, and unless the same be paid that the land be sold, as provided by law. That in the body of said judgment said amount purported to be for the taxes delinquent thereon for the years 1857 to 1880, inclusive, while in the caption it purported to be for a judgment for the taxes delinquent thereon for the years 1879 and prior years, and in the year 1889 and prior years, while in fact there had been no taxes assessed against the land subsequent to the year 1880. That the taxes for 1880 were included in the judgment of August 25, 1881, and in the judgment of September 12, 1893, but that neither judgment showed the amount of such taxes of 1880, or of any particular year or years, but each judgment was for one gross sum.

(5) That the land was duly advertised for sale, and notice of sale given, under and by virtue of the judgment rendered September 12, 1893. That at the time and place named in said notice the premises were sold at public auction to the plaintiff for $200, he being the highest bidder.

(6) That the county auditor on the same day delivered to plaintiff a certificate of sale in due form of law, he having paid said sum therefor.

(7) That notice of expiration of redemption was given.

(8) That the time for redemption expired before the action was commenced. And

(9) That the land was then vacant and unoccupied.

As conclusions of law, the court found:

(1) That the law of 1893 did not apply to lands against which judgment was entered in 1881, and which were not sold or forfeited to the state thereunder, as required by Laws 1881, c. 135, and which had not since been taxed, and become delinquent.

(2) That the judgment of 1881, and the claim on which it was based, was barred by the statute of limitation before the passage of the act of 1893, and the legislature had no power to revive it.

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(3) That plaintiff acquired no title to the land by reason of the tax sale and certificate, and that defendant was entitled to judgment.

From a judgment entered in pursuance to the above findings, plaintiff appealed. Affirmed.

Little & Nunn, for appellant.

Francis G. Burke, for respondent.

COLLINS, J. There is no question but that the claim of the state for taxes upon the land herein involved (judgment for the amount of such taxes having been entered August 20, 1881, under the provisions of Laws 1881, c. 135) was barred by the statute of limitations [2] prior to the enactment of Laws 1893, c. 150, and that it was not in the power of the legislature to revive the lien. Pine County v. Lambert, 57 Minn. 203, 58 N. W. 990. So that if defendant, as the owner of an undivided half of the land, had answered in the proceedings had under the statute last mentioned, pleading the statute of limitation in bar, no judgment could have properly been entered. The case would have been exactly the counterpart of the one just cited. But defendant owner did not appear in these proceedings, and a default judgment was rendered for the amount of the 1881 judgment, with interest and costs. The effect of these proceedings, based upon the legislative enactment, was, if held valid, to revive an outlawed tax judgment, and to restore a lost lien for taxes to the state.

That defendant had title to an undivided half of the land, and that the state had no claim upon it, when the proceedings were initiated, must stand admitted. It must also be conceded that every step taken by the state looking towards enforcement of the payment of taxes under the 1893 act was without the slightest claim or color of right. If the plaintiff's assertion of ownership in fee, through a sale made upon the 1893 judgment, is upheld, defendant, through a proceeding in rem instituted by the state, and ostensibly for the collection of taxes, has been deprived of a vested right of property without the shadow of a rightful claim upon it.

As before stated, the proceedings under which plaintiff claims title were based upon the provisions of Laws 1893, c. 150. This act may be found in G. S. 1894, in a note on page 429. The first section provides that on or before July 15, 1893, the county auditors shall prepare, and file with the clerks of the district courts, lists of all par-

[2] G. S. 1894, § 5135.

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cels of land in their respective counties against which a judgment for taxes was entered under the provisions of Laws 1881, c. 135, which were not sold to an actual purchaser at the sale held under that law, and which still remain unsold and unredeemed, and against which the tax judgment remains unsatisfied. Upon its face, this statute authorized and directed to be included in these lists lands which had not been sold, or even offered for sale, under the 1881 judgments, and against which the state had no claim for taxes, namely, lands upon which the lien of the state, and its right to proceed, had long before been lost.

The charge for taxes on this particular tract of land prior to 1879 had merged in the 1881 judgment, and no sale to enforce a collection thereof had ever taken place. The statute of limitations had run against the judgment, and against all proceedings through which the taxes could be collected. Because the lien and right of the state had been extinguished by the lapse of time before the passage of the 1893 statute, it was not in the power of the legislature to restore and revive it. Pine County v. Lambert, supra. The state was as powerless to revive a right which had terminated, or to create a claim when none existed, as would have been a private individual. It could not, by asserting the existence of a right or claim, create or establish one by legislative enactment. Nor could it, by the mere assertion of a wholly unfounded claim or right, confer upon a court the power to adjudicate, in proceedings in rem, that such a claim or right existed; for there is no claim or right, in such a case, upon which a court could pass. But by the enactment of the 1893 statute the legislature proceeded upon the groundless assumption that the state had a rightful claim upon a certain class of lands for delinquent taxes, and, in terms, empowered the district courts to proceed against the res to enforce the collection of such claim. As to these lands, the vested right of property in the owners was within the protection of the constitution, and of this vested right the owners could not be deprived without due process of law.

If the legislation was invalid because there was nothing to legislate upon, the action of the court could not impart validity into the legislation, and hence the court might as well have proceeded to render judgment without any legislation whatsoever. No one would attempt to defend the conclusiveness of the 1893 judgment had there been no

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legislation in respect to taxes against which judgment had been entered in 1881. So that, at the last analysis, we really have a case where, in proceedings to enforce the collection of taxes, a judgment has been entered against a tract of land for taxes which not only did not exist, but which was entered without legislative authority. But this is not specially important, for it was impossible for the legislature to confer jurisdiction upon the district court over the subject-matter on which it acted,—the extinguished tax liens,—unless valid legislation could be had in reference to such liens, and their enforcement, as against the land itself, by a proceeding in rem.

A law is constitutional which provides for the collection of taxes by a proceeding in rem, although the owner of the res is a resident of the state, and is even an occupant of the res. Such a proceeding is due process of law. But the state can no more be given the right to proceed against such a resident or occupant by a proceeding in rem to enforce every imaginary right or claim which it pretends to have, than a private individual can be given such right. It is true that there are a large class of such tax proceedings where, in order to determine the rights of the state, a judicial inquiry is necessary in each case. A proceeding in rem is due process of law, and, whether the decision is right or wrong in the particular case, the court has jurisdiction, and if the statute is complied with the judgment is valid. And this is true whether the proceeding is an original one, or a subsequent proceeding brought to ascertain the validity, or to cure an invalidity in a prior proceeding, as in chapter 150, supra. But if, under the pretext of enforcing the payment of taxes, a statute provides for the institution of proceedings in rem in a class of cases in which it affirmatively appears on the face of the statute that the state has no claim, or color of claim, the proceeding is not due process of law, and as to that class of cases the statute is unconstitutional. There is nothing in this case for judicial inquiry, beyond the denunciation of the statute itself, and the legislature cannot hide such an unfounded claim behind such a pretended inquiry. The state cannot use for such a purpose its prerogative right to collect taxes by a proceeding in rem against the property of persons over whom it may readily obtain personal jurisdiction within this state. Supposing the legislature had prefaced this statute with a preamble in which it was recited that "whereas, in many cases, tax judgments

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were entered under Laws 1881, c. 135, but no tax sale was ever made on the judgment, and all such judgments are now outlawed, but by proceeding against the property in rem the state may in many cases catch the owners of the same asleep, and obtain judgment against the property: Now, therefore, be it enacted," etc. What would such a preamble add to this statute?

There may be, and undoubtedly is, a large class of cases covered by this statute where a judicial inquiry was both necessary and proper. But it affirmatively appears on the face of the statute that there is another class for which it attempts to provide, but in which such inquiry is neither necessary nor proper, to wit, cases where a judgment was entered under the law of 1881, and no sale was ever made thereon. These judgments had been outlawed two years when the law of 1893 was passed, and it did not require the proof of any fact in any court to show this. If the state is foolish enough to permit the statute of limitations to run against the right to collect taxes, and thereby offer a premium on evading payment, it must suffer the consequences. That the legislature attempted to do a thing it was powerless to do; that its action was impotent; that in so far as it authorized the court to acquire jurisdiction over the res by seizure under process, and to proceed in behalf of the state against lands on which it had no color of claim, there was no due process of law; and that there was no source for the exercise of jurisdiction by the court over the subject-matter,—conclusively appeared on the face of the statute. The law applicable in such cases is thus stated: If the alleged jurisdiction of a court to take any particular action is derived from a statute, and the statute is shown to be unconstitutional, the proceedings of the court must be considered void. Black, Judgm. § 216. And again, when considering the subject of collateral attack, the same author says (section 240) that, in every case where jurisdiction of the subject-matter is challenged, recourse must be had to the source of jurisdiction, whether constitution or statute, and an unconstitutional statute can have no avail as a source of jurisdiction.

Our conclusion is that, in so far as the act in question undertook to confer jurisdiction upon the district court to proceed as against lands upon which the state had lost its lien for taxes, and had no color of right to enforce collection thereof, it was unconstitutional, because not due process of law.

Judgment affirmed.

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SECURITY BANK OF MINNESOTA v. WILLIS J. HOLMES and Another.[1]

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July 17, 1896.

Nos. 9946—(238).

Covenants in Mortgage against Incumbrances—Running with Land.

A covenant against incumbrances which are a money charge on the land runs with the land, and an action may be maintained thereon by a remote grantee, who has discharged the incumbrances, although such covenant is one of the covenants in a mortgage through which he acquired his title to the land by a purchase thereof at a foreclosure sale.

Appeal by plaintiff from an order of the district court for St. Louis county, Moer, J., sustaining a demurrer to the complaint. Reversed.

Cobb & Wheelwright, for appellant.

Covenants of seisin and against incumbrances in most states are held to be covenants in præsenti, and do not run with the land. In Maine, Colorado, and Georgia statutes declare that the covenants against incumbrances shall run with the land, and vest in the assigns of the covenantee. The same result has been obtained in New York, Ohio, Minnesota, and other states, by establishing a rule that every action must be prosecuted in the name of the real party in interest. Rawle, Cov. Title, § 211; 19 Am. & Eng. Enc. Law, 1008. See Gen. St. 1883, Colo. § 207; 1 Codes & Statutes Cal. (Hittell, 1876) §§ 6460–6467. This court has held that the covenants of seisin and against incumbrances run with the land. Kimball v. Bryant, 25 Minn. 496; Hawthorne v. City Bank, 34 Minn. 382, 26 N. W. 4. In the following cases it has been held that the covenant against incumbrances runs with the land, and can be enforced by a remote grantee. Knadler v. Sharp, 36 Iowa, 232; M'Crady v. Brisbane, 1 Nott & McC. 104; Sprague v. Baker, 17 Mass. 585; Cole v. Kimball, 52 Vt. 639; Richard v. Bent, 59 Ill. 38; Post v. Campau, 42 Mich. 90, 3 N. W. 272; Foote v. Burnet, 10 Ohio, 317, 332; Colby v. Osgood, 29 Barb. 339; Roberts v. Levy, 3 Abb. Pr. (N. S.) 311; Ernst v. Parsons, 54 How. Pr. 163; Andrews v. Appel, 22 Hun, 429; Dickson & Gantt v. Desire, 23 Mo. 151, 163; Walker v. Deaver, 79 Mo. 664, 675; Taylor

[1] Reported in 68 N. W. 113.

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v. Priest, 21 Mo. App. 685; Martin v. Baker, 5 Blackf. 232. The liability under a covenant in a mortgage is the same as if the covenant were in a deed. Rawle, Cov. Title, § 26; Tefft v. Munson, 57 N. Y. 97; Jackson v. Little, 56 N. Y. 108; Thomas, Mortg. § 27; Ayer v. Philadelphia & B. F. B. Co., 157 Mass. 57, 31 N. E. 717; Sandwich Mnfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379; Butler v. Seward, 10 Allen, 466.

The liability for breach of covenant against incumbrances continues after foreclosure. It makes no difference whether the purchaser be the mortgagee or a stranger, for the benefits of covenants for title pass to the purchaser at judicial sales. American B. & L. Assn. v. Waleen, 52 Minn. 23, 53 N. W. 867; Lawton v. St. Paul P. L. Co., 56 Minn. 353, 57 N. W. 1061; Jackson v. Littell, 56 N. Y. 108; Devin v. Hendershott, 32 Iowa, 192.

Washburn, Lewis & Judson, for respondents.

A covenant against incumbrances does not run with the land. Kimball v. Bryant, 25 Minn. 496; Rawle, Cov. § 70; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Funk v. Voneida, 11 S. & R. 109, 14 Am. Dec. 617; Jones v. Warner, 81 Ill. 343; Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142.

A purchaser at foreclosure sale is presumed to know the condition of the title, and to bid at his own risk; and if the title be doubtful, he can have it examined, and refuse to accept it, if defective. Jones, Mortg. § 1646; Pingrey, Mortg. § 1960; American B. & L. Assn. v. Waleen, 52 Minn. 23, 53 N. W. 867; Norton v. Taylor, 35 Neb. 466, 53 N. W. 481; Bishop v. O'Connor, 69 Ill. 431; Roberts v. Hughes, 81 Ill. 130; Hanger v. State, 27 Ark. 667; McMurry v. Brasfield, 10 Heisk. (Tenn.) 529; Boggs v. Fowler, 16 Cal. 560; Jackson v. Littell, 56 N. Y. 108; Riggs v. Purcell, 66 N. Y. 193; Graham v. Bleakie, 2 Daly, 55.

Covenants in a mortgage are security for the debt, and not for the title. The broken covenants in a mortgage do not pass to the purchaser at foreclosure, but are wholly for the benefit of the mortgagee; and whatever right of action there may be remains in the mortgagee as security for any deficiency upon his debt after foreclosure, and does not pass to the purchaser. Jones, Mortg. § 68; Todd v. Johnson, 51 Iowa, 192, 1 N. W. 498; Corbin v. Reed, 43 Iowa, 459.

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START, C. J. The defendants, on August 31, 1889, executed and delivered to the W. B. Clark Investment Company a mortgage containing the usual covenants, including one against incumbrances, on certain real estate in the city of Fergus Falls in this state. On March 19, 1890, this mortgage was duly assigned to the plaintiff, and was afterwards foreclosed by action, and the premises sold to the plaintiff, and on January 31, 1893, a final decree was entered in the action vesting the title thereto in the plaintiff. At the time this mortgage was executed by the defendants, the premises therein described were incumbered by a prior mortgage in the sum of $2,500, and further by a certain party-wall contract. See First Nat. Bank v. Security Bank of Minnesota, 61 Minn. 25, 63 N. W. 264. The plaintiff paid and discharged the prior incumbrances, and brings this action on such covenant against incumbrances to recover from the defendants the amount so paid. The complaint duly alleged in detail the foregoing facts, to which the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The plaintiff appeals from an order sustaining the demurrer.

1. The first question presented by the record for our decision is, does a covenant against incumbrances run with the land? It is held by many of the courts in this country that of the five usual covenants in a deed of real estate, three of them—seisin, right to convey, and that the land is free from incumbrances—are personal covenants, and do not run with the land, for, if not true, there is a breach of them as soon as made, and they become choses in action, which are not technically assignable. After stating this rule, Chancellor Kent adds:

"It is, however, to be regretted that the technical scruple that a chose in action was not assignable does necessarily prevent the assignee from availing himself of any or of all the covenants. He is the most interested and the most fit person to claim the indemnity secured by them, for the compensation belongs to him as the last purchaser and the first sufferer."

4 Kent, Comm. 472.

This "technical scruple" has no force in this state, where choses in action are assignable; hence, on principle, there is no reason why we should not hold that the last purchaser and the first sufferer—that is, he who pays the prior incumbrance—is entitled to the benefit of

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the covenant, and to the right of maintaining an action thereon in his own name.

Where the incumbrance, as in this case, can be discharged by the payment of a definite sum of money, there is only a technical breach of the covenant, and a right to only nominal damages therefor until the owner of the land pays the amount of the incumbrance, when the right to recover substantial damages first accrues for the first substantial breach of the covenant. Justice then requires that the owner of the land (whether he is the original covenantee or a remote grantee against whose land the incumbrance is first attempted to be enforced), who pays it, should have the benefit of the covenant which was made and taken for the protection and assurance of the title, which the covenantor assumed by his deed to pass to the covenantee.

It is immaterial whether we say that a covenant against an incumbrance which is a money charge on the land runs with the land, or that the cause of action for a breach of the covenant is assignable, and passes by deed to the grantee of the covenantee, immediate or remote, who sustains injury by reason of the incumbrance; for in either case we reach the same result. The covenant, which is one of indemnity, in effect attaches itself to the title assumed to be conveyed by the deed, and accompanies it for the protection of the covenantee or any of his assigns who may finally be injured by the incumbrance. In short, for all practical purposes, a covenant against incumbrances which are a money charge on the land runs with the land until they are discharged. Kimball v. Bryant, 25 Minn. 496. In that case the covenant was one of seisin, but the reason upon which the decision was based applies with greater force to the covenant against incumbrances, and establishes for this state the rule that an action on such covenant can be maintained by an assignee of the covenantee. Hawthorne v. City Bank, 34 Minn. 382, 26 N. W. 4. See further, on this question, Cole v. Kimball, 52 Vt. 639; Post v. Campau, 42 Mich. 90, 3 N. W. 272; Knadler v. Sharp, 36 Iowa, 232.

2. It is, however, claimed in behalf of the defendants that, whatever the rule may be where the covenant is in a deed, and the title passes by deed to the remote grantee of the covenantee, no right of action upon the covenant contained in a mortgage passes at a foreclosure sale to the purchaser.

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In support of this claim counsel for defendants rely on 1 Jones, Mortg. § 68; Corbin v. Reed, 43 Iowa, 459; Hitchcock v. Merrick, 18 Wis. 375; Todd v. Johnson, 51 Iowa, 192, 1 N. W. 498. In the first case cited the covenant in the mortgage was that the property should be kept in good condition, and it was held that, after foreclosure and a sale of the mortgaged premises for the full amount of the debt and cost, an action could not be maintained by the mortgagee, who was the purchaser, for waste committed by the mortgagor before the foreclosure. This covenant did not relate to the title, but to the condition of the premises, which sold for enough in their then condition to pay all of the claims of the mortgagee against the land; and it necessarily followed that no cause of action on the covenant survived or passed by the sale, whether the purchaser was the mortgagee or a third party. In the second case the covenant in the mortgage was that all taxes on the premises should be paid prior to the day for the sale of land for taxes. After a foreclosure sale of the premises to the mortgagee for the full amount of his debt and cost, he brought an action to recover the amount of taxes on the land at the date of the sale, which were assessed after the execution of the mortgage, and it was held that he could not recover. The case is not in point, for the reason that taxes assessed after the making of a covenant against incumbrances are not a breach of it. Rawle, Cov. § 77. There is a statement in Jones, Mortg. § 68, which supports defendants' claim, but it rests solely on the case of Todd v. Johnson, supra. This last case is in point, and is, so far as we are advised, the only case to be found that supports defendants' contention. In the case referred to the covenant was one of warranty, contained in a mortgage which was foreclosed, and the mortgagee had judgment, and purchased the premises for the full amount of his debt; and it was held for this reason that he could not afterwards maintain an action upon the covenants of the warranty in the mortgage, unless the sale and satisfaction of the judgment were first set aside. The opinion in this case indicates that the conclusion reached was based largely upon the effect of the statute of Iowa as to the foreclosure of mortgages.

However this may be, we are unable on principle to see any difference as to the rights of a grantee of a covenantee to maintain an action for a breach of a covenant against incumbrances, whether he

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obtained his title through a deed containing the covenant or through a mortgage with a like covenant. In each case the covenant attaches itself to the title for the protection of the covenantee or his assigns whom the incumbrance may eventually damnify. The fact that the premises bring enough at the foreclosure sale to pay the mortgage debt does not affect the question, because, if no redemption is made, the mortgage remains, with all of its covenants, as a muniment of title, to the same extent as if it was a deed. The purchaser at the foreclosure sale buys the title as warranted and guarded by the covenants in the mortgage. He buys, subject to the right of redemption, the title to the land as protected by the covenants in the mortgage. Lawton v. St. Paul P. L. Co., 56 Minn. 353, 57 N. W. 1061; Thomas, Mortg. § 27.

In those states where a mortgage conveys the fee, and can only be defeated by a performance of the conditions as to payment, and where there is no sale of the premises, but a strict foreclosure, it is clear that whoever becomes the owner of the land by virtue of his ownership and foreclosure of the mortgage is entitled to the benefit of the covenants therein which run with the land. The same conclusion as clearly follows in this state, where the mortgage is regarded as a lien to secure the debt, as in states where there is no sale of the premises, but a strict foreclosure. The mortgage and its covenants are the foundation of the title, which becomes absolute if the premises are not redeemed within the time limited. So, too, where, as in the case at bar, there is a sale of the premises by the judgment of the court, the benefit of the covenants passes to the purchaser at the sale for the protection of his title. This is the settled rule in cases of judicial and execution sales. Rawle, Cov. § 213, note; Rorer, Jud. Sales, § 969. In all of these suggested cases, as well as in the case where the foreclosure is by advertisement by virtue of a power of sale in the mortgage, the principle is the same. It is the mortgage which ultimately vests the title to the premises in the purchaser, and the benefit of all covenants that run with the land pass with the title to the purchaser.

Our conclusion is that the complaint states a cause of action, and that the order sustaining the demurrer must be reversed. So ordered.

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GRANT WYATT v. MARY G. QUINBY.[1]

July 17, 1896.

Nos. 10,010—(245).

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Foreclosure of Mortgage—Payment of Taxes after Sale.

The defendant, as assignee of a mortgage on land owned by the plaintiff, foreclosed the same by advertisement, by a sale of the premises, at which she was the purchaser. After the sale she paid taxes which were due at the date of the sale on the premises so purchased. *Held*, in an action by the plaintiff to recover an alleged surplus of the proceeds of such sale, construing G. S. 1894, §§ 1619, 6046, that the defendant was not entitled to retain from such proceeds the amount of the taxes so paid.

Same—Affidavit of Costs and Disbursements as Evidence.

The attorney foreclosing the mortgage included in his affidavit of costs and disbursements filed pursuant to G. S. 1894, § 6051, a statement of the amount of the taxes paid. *Held*, that such affidavit was not admissible in evidence to establish the fact and time of such payment.

Findings Sustained.

Evidence considered, and *held* to sustain the findings of fact of the trial court.

Appeal by defendant from an order of the district court for Hennepin county, Russell, J., denying a motion for a new trial, and also from a judgment in favor of plaintiff. Affirmed.

Chas. J. Bartleson and *Wm. Peet*, for appellant.

Smith, Pulliam & Smith, for respondent.

START, C. J.[2] Action to recover a surplus upon a sale of mortgaged premises on foreclosure by advertisement.

The material facts, as found by the trial court, are substantially these: The defendant was the assignee of a mortgage upon certain real estate owned by the plaintiff, which she foreclosed on March 19, 1894, by advertisement. The notice of foreclosure was in the usual form, and stated that the premises would be sold to pay the principal and interest on the mortgage, and any further sums paid by her for taxes. Pursuant to such notice, the mortgaged premises were, on the day named, sold to the defendant for the sum of $6,149.

[1] Reported in 68 N. W. 109.

[2] Mitchell, J., took no part.

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There was then due to her, as principal and interest on the mortgage, $5,335.06, and $87.50 for insurance paid by her, and the expenses of the foreclosure were $112.60. The defendant had not paid any taxes prior to such sale, but on or about April 5, 1894, she did pay, for taxes on the premises so purchased by her, the sum of $603.84.

Upon these findings the trial court, as a conclusion of law, found that the plaintiff was entitled to recover from the defendant the sum of $603.84, and ordered judgment accordingly. The defendant moved for a new trial, which was denied, and judgment was entered in accordance with the trial court's conclusions of law. The defendant appealed from both the order and judgment.

The only respect in which the court's findings of fact are challenged by the defendant is the finding that the taxes were not paid until after the foreclosure sale, and about April 5, 1894; that is, some 17 days thereafter. The records of the county auditor's office were received in evidence without objection, and showed that the taxes in question were paid April 5, 1894. The attorney who foreclosed the mortgage, after seeing such records, testified that he would not attempt to say that the records were not correct, but that it was his intention to pay the taxes at the time of the sale, and, to the best of his recollection, he did so. He had previously testified that he had done so. Upon the whole evidence, it is difficult to see how the trial court could have found otherwise than it did; but, in any view of the case, the finding is amply sustained by the evidence.

The attorney foreclosing the mortgage, in his affidavit of costs, disbursements, and attorney's fees, made on the day of sale, included in a statement attached to the affidavit the taxes here in question, as having been actually paid. This affidavit was offered as original evidence, and excluded by the court. This ruling is assigned as error. It was correct. The taxes claimed to have been paid were no part of the "costs and disbursements, including attorney's fees embraced in the foreclosure sale," which the statute (G. S. 1894, § 6051) requires to be set forth in the affidavit to be made and filed within ten days after the foreclosure. As to the taxes, it is simply the voluntary, ex parte statement of the person making the affidavit,—just as much so as if the statement had been as to the amount due on the note secured by the mortgage. Whether, in the absence of any statement so providing, the affidavit would be admissible in evidence as

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proof, prima facie, of the costs and disbursements on the foreclosure, we do not suggest any opinion.

Practically, the only question presented by the record for our decision is this: Can a mortgagee, after a foreclosure of his mortgage by advertisement, and a sale of the mortgaged premises, pay taxes due thereon at the date of the sale, and reimburse himself for the amount so paid from the proceeds of the sale of the premises?

The claim of defendant's counsel is that the mortgagee has this right, under the provisions of G. S. 1894, § 6046, which reads thus:

"If after sale of any real estate made as herein prescribed, there remains in the hands of the officer making the sale any surplus money, after satisfying the mortgage on which such real estate was sold, and payment of the tax and cost of sale, the surplus shall be paid over by said officer, on demand, to the mortgagor, his legal representatives or assigns."

This statute does not authorize the sheriff to pay the taxes due on the mortgaged premises, or pay the amount thereof to the mortgagee from the proceeds of the sale, without reference to whether or not the taxes have been paid before the foreclosure sale. If such was the meaning of the statute, then, in cases where the mortgagee had not paid the taxes, and did not intend to, and the premises were sold on the foreclosure to a third party, for just the amount of the mortgage debt and costs of foreclosure, the sheriff could pay the taxes for the benefit of the purchaser, and turn over the tax receipts to the mortgagee, as a part of the purchase price of the premises. It can make no difference, in such a case, as to the right of the sheriff to pay the taxes from the proceeds of the sale, whether the mortgagee or a third party is the purchaser.

But section 6046 must be construed in connection with G. S. 1894, § 1619, which provides that:

"Any person who has a lien by mortgage or otherwise, upon any real property on which the taxes have not been paid, may pay such taxes and the interest, penalty and costs thereon; and the receipt of the county treasurer shall constitute an additional lien on such land * * * and the amount so paid * * * shall be collectible with, as a part of, and in the same manner as, the amount secured by the original lien."

The construction of this section 1619 has been so frequently and recently considered in this court that we need not here repeat our

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views in respect to it. Reading section 6046 in connection with section 1619, as we construed it in Gorham v. National Life Ins. Co., 62 Minn. 327, 64 N. W. 906, and previous cases, the meaning of the former is clear. It is the taxes which have been paid by the mortgagee or assignee prior to the foreclosure sale, pursuant to section 1619, which are to be paid from the proceeds of the sale in the hands of the sheriff, and none others, before the surplus is paid to the mortgagor. While this precise point was not necessarily involved in the cases to which we have referred, yet the construction therein given to these sections of the statute leads directly to the conclusion we have stated, to the effect that the mortgagee who purchases the mortgaged premises at the foreclosure sale cannot, after the sale, pay the taxes, and have the amount thereof paid to him out of the proceeds of the sale. No taxes paid subsequent to the foreclosure of the mortgage by a sale of the premises can be deducted from the proceeds of the sale, as against the mortgagor. Spencer v. Levering, 8 Minn. 410 (461); Nopson v. Horton, 20 Minn. 239 (268); Gorham v. National Life Ins. Co., 62 Minn. 327, 64 N. W. 906.

We recognize the hardship of this particular case, and the good faith of the attorney who foreclosed the mortgage, but the plaintiff's claim has the support of strict legal right.

Order and judgment affirmed.

UNITED STATES EXPRESS COMPANY v. AUGUST T. KOERNER.[1]

July 17, 1896.

Nos. 10,045—(216).

Express Company—Limit of Liability — Concealment of Value — Right to Additional Compensation.

Defendant delivered to the plaintiff express company at St. Paul, Minn., to be carried to Washington, D. C., a sealed package containing 20 registered United States government bonds of the value of $234,000, informed it that the value was $1,000, concealed from it that they were of greater value, and paid for carrying the same 75 cents, which was the usual price

[1] Reported in 68 N. W. 181.

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for so carrying such a package of the value of only $1,000. In an action to recover additional compensation, *held*, in case of loss, the limit of plaintiff's liability was for failure to deliver $1,000 worth of such bonds, and it is not entitled to recover on the theory that, in case of loss, the limit of its liability was for failure to deliver the whole $234,000 worth of bonds.

Same—Increase of Risk within Limit.

Held, further, it is entitled to recover compensation for any increase of risk within the $1,000 limit, caused by the fact that it handled and carried so valuable a package.

Dismissal of Action—New Trial—Nominal Damages.

At the close of plaintiff's evidence the court below, on defendant's motion, dismissed the action. *Held*, this court will not grant a new trial merely because plaintiff may have been entitled to nominal damages.

Appeal by plaintiff from an order of the district court for Ramsey county, Otis, J., denying a motion for a new trial. Affirmed.

F. F. Davis, for appellant.

H. W. Childs and *Geo. B. Edgerton*, for respondent.

CANTY, J. The defendant, as treasurer of the state of Minnesota, purchased from the former owners 20 registered United States government bonds of the face value of $10,000 each, or a total face value of $200,000, for which he paid the sum of $234,000, as an investment of the permanent school funds of this state. The bonds were all registered in the names of such former owners, and were by them duly assigned, on the back thereof, to the state. Defendant, desiring to have the bonds canceled and reissued to the present owner, delivered them in a sealed envelope at St. Paul, Minn., to the plaintiff express company, to be by it carried to Washington, D. C., and there delivered to the register of the United States treasury for that purpose. The envelope was addressed to such register, and there had been indorsed on it by defendant the words: "Bonds. Value, $1,000." Plaintiff's agent asked him what the package contained, and he answered, "Registered United States Bonds," and the agent stated that the charge was 75 cents, which he paid. He received from the agent a receipt, in which it was stated that the package is "said to contain bonds, valued at $1,000," but further than that he did not disclose to plaintiff the character or value of the contents of the package. The package was safely carried to its destination, and delivered to the consignee.

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On subsequently discovering that the bonds in the package were of the face value of $200,000, the express company brought this action to recover additional compensation, and alleges in its complaint that defendant fraudulently concealed from it the true value of the package, and that a reasonable compensation for carrying the same, as aforesaid, was the sum of $100. On the trial, at the close of plaintiff's evidence, the court, on defendant's motion, dismissed the action, and from an order denying a new trial plaintiff appeals.

We are of the opinion that the order appealed from should be affirmed.

While a number of plaintiff's expert witnesses testified that the service so performed was worth the sum of $117, on cross-examination each of these witnesses stated that his estimate of the value was based on the assumption that the limit of liability, in case of loss, was not $1,000, but $234,000; and when driven from this position he stated as a reason for his opinion, in substance and effect, that the express company, having prepared itself with all necessary facilities for carrying packages of great value, was by defendant's acts deprived of the opportunity to incur a larger liability and earn a larger fee in the carrying of this package; but that, laying aside these considerations, and assuming the limit of liability to be $1,000, the value of the service was 75 cents. Under the circumstances, plaintiff's liability did not exceed $1,000; in fact, it is very improbable that its liability would even amount to that for the loss of such a bond of the value of only $1,000. It was admitted on the trial that if the bonds were lost or stolen, a stranger coming into possession of them could not give title by transferring them, so that the actual loss would be the expense of applying to the treasury department, making the proper proofs, complying with its regulations, and procuring new evidence of the indebtedness represented by the bonds. Neither had plaintiff any vested right to have a larger value placed on the package for the purpose of permitting it to incur a larger liability, and thereby earn a larger fee. The consignor had a right to take the risk himself.

But it does not follow from all this that the express company was not entitled to a larger fee than it received. The limit of its liability was the cost of restoring such bonds of the value of $1,000, and no more. But, even this liability may have been considerably increased

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by the fact that the aggregate face value of the bonds in the package was so great. There is a much greater temptation to steal a package of bonds of such apparently great value than there is to steal a package of such bonds the face value of which does not exceed $1,000. Thieves and robbers might have discovered this great apparent value while the express company would remain ignorant of it, and, the precautions for the safety of the bonds being less, the opportunity to steal them might have been greater. While none of these facts increased the limit of plaintiff's liability, they may have increased the risk within that limit, and they might all have been taken into consideration in determining the amount of that risk and the amount of compensation which should have been allowed for the same.

But the plaintiff did not try its case on any such theory, and has not, either in the court below or in this court, raised any such question. Besides, there is at most no evidence in the case from which the jury would be justified in finding for the plaintiff more than nominal damages in addition to the 75 cents already paid, and we would not reverse the order of the court below simply because plaintiff is entitled to nominal damages. Singer Mnfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 23; Palmer v. Degan, 58 Minn. 505, 60 N. W. 342.

The order appealed from should be affirmed. So ordered.

WILLIAM RASICOT v. LITTLE FALLS IMPROVEMENT & NAVIGATION COMPANY.[1]

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July 17, 1896.

Nos. 10,059—(165).

Deed—Grant of Boomage Rights—Construction—Setting back Water.

Held, that under a deed from plaintiff and his wife, whereby they granted to defendant's remote grantor certain boomage rights and privileges in a driving stream bordering on plaintiff's farm, taking into consideration the circumstances of the transaction, the particular situation of the parties, and the condition of the thing granted, defendant did not obtain the

[1] Reported in 68 N. W. 212.

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right to deprive plaintiff of the beneficial use of his farm by maintaining booms and assorting works at a point two or three miles down the stream, whereby log jams were formed, and the water dammed and penned up so as to flood the farm and practically destroy its use.

Action in the district court for Morrison county to recover damages for overflowing plaintiff's land. The jury rendered a verdict in favor of plaintiff for $629.20, which sum, according to their special finding, included $125, assessed as damages for removing logs. From an order, Baxter, J., denying a motion for a new trial in case plaintiff should file a stipulation reducing the verdict by said sum of $125, defendant appealed. Affirmed.

Clapp & Macartney and *Lindbergh, Blanchard & Lindbergh*, for appellant.

Taylor, Calhoun & Rhodes, for respondent.

COLLINS, J. From some time prior to the year 1882, plaintiff has been the owner and in possession of a farm situated on the east bank of the Mississippi river, a few miles above the city of Little Falls. That year, for the sum of $50, he granted and conveyed to N. P. Clarke and others, his wife joining in the deed,

"All the right, title, and interest in and to the use and enjoyment of the Mississippi river, the water thereof, and the land covered thereby, for the purpose of booming and holding logs, lumber, and timber therein, which the said parties of the first part, or either of them, now have by reason of their or either of them being now the owner or owners in fee simple of all"

—of said land, particularly describing the same.

Following the description in the deed of conveyance were these words:

"Hereby granting to the said parties of the second part, their heirs and assigns the sole, exclusive, and perpetual right to erect and construct all piers and booms; to drive and place all posts and piling that may be necessary and proper for the exercise of the right and privilege of booming and holding logs, lumber, and timber hereinbefore granted said parties of the second part, their heirs and assigns, having the right to place said piers, posts, and pilings, as well as whatsoever else may be necessary and proper for the booming and holding of logs, lumber, and timber, as aforesaid, either in said river or in the shore thereof, upon the real estate hereinbefore described; said parties of the second part, their heirs and assigns having the fur-

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ther right to attach the said booms to the banks of said river wherever and whenever it may be proper and necessary, and by such means as may be proper and necessary."

Then followed some provisions of no consequence here.

The defendant corporation was organized under the law of this state in the year 1891, for the avowed purpose of improving and facilitating the navigation of the river from a point specifically named, and within the corporate limits of said city, to the mouth of Crow Wing river, several miles above plaintiff's farm, and to erect and maintain booms and such other structures as might be necessary for its business, and to boom, hold, handle, and assort, out of the general mass of logs and lumber coming down the river, such as were destined to be manufactured anywhere within the points heretofore mentioned. Soon after its organization, defendant, through several mesne conveyances, succeeded to all of the rights secured by Clarke and his associates under and by virtue of the deed of conveyance executed and delivered by plaintiff and his wife.

It does not appear from the record that defendant has in any direct manner exercised its rights or privileges obtained through the original grant; but, from the evidence introduced on the trial in support of the allegations of the complaint, it undisputedly appeared that defendant had constructed piers and booms some two or three miles below plaintiff's farm, and, at different times during the years 1892, 1893, and 1894, had held back, for the purpose of assorting, large quantities of logs and lumber, thereby causing the formation of large log jams in the stream; the inevitable result being to retard and dam up the waters, so that they overflowed the river banks, ran into the cellar of plaintiff's dwelling house, inundated his fields, destroyed his crops, and, if maintained, will ruin his entire farm.

This action was brought to recover the damages resulting from this overflow, and the claim made by defendant is that it obtained the right to flood the farm, to the extent stated, through the grant to Clarke and others, made for a consideration of $50, in 1882, about ten years prior to the construction of defendant's piers and booms some two miles down the river.

A construction of the language of the deed is therefore called for; and while we recognize the rule that the language of all grants is to be construed most strongly against the grantor, and in favor of the

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grantee, and, further, that the grant of the principal thing carries with it whatever is necessary to the beneficial enjoyment of the thing granted, we are further to remember that, in the construction of grants, the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. We must also bear in mind that, if defendant's construction prevails, it will have the right to destroy plaintiff's dwelling house and farm by overflowing and flooding, whenever log jams are made as the result of its holding of logs and lumber at its assorting works, when, from the circumstances so far as shown, it would seem highly improbable that such an important right or privilege—one so disastrous to the grantors—was ever intended to be conveyed or obtained. A construction of the grant so objectionable to a sense of justice should only be permitted upon clear and unmistakable language. Fortunately, we have no such case before us.

Taking the circumstances, the particular situation of the parties, and the state of the thing granted, so far as these matters are disclosed, we find the owner and occupant of a farm bordered by the river, his wife joining in the conveyance, granting to other parties, who do not appear to have had any booms or booming privileges of any description elsewhere on the stream, or even to have been engaged in such business, or in any business connected therewith, the use and enjoyment of the river for log-booming purposes, in so far as the grantors themselves had such use and enjoyment by virtue of being owners of the land composing the farm. Incident to this was the grant of the right to erect piers and construct booms, to drive posts and piling, and to do whatever else might be necessary and proper for the booming of logs, in the river or on the shores, including the right to attach booms to the river banks whenever and wherever necessary, and by any proper means. This is what was granted, and nothing more, at a time long prior to the organization of defendant corporation, and many years before it erected the piers and constructed the booms and assorting works which have caused the running logs to form in jams, by reason of which plaintiff has been deprived of the beneficial use of his farm.

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When we come to consider the language used in the deed in the light of the facts, we find that Clarke and his associates acquired nothing more than ordinary boomage, shore, and riparian rights and privileges, incident and belonging to plaintiff's land, including the right to place such structures, as piers, posts, and piling, as might be essential for the proper use and enjoyment of such rights and privileges upon the shores of the river, if desired, and to attach booms to such shores by any proper methods. The rights and privileges, so far as they related to plaintiff's land, were to use and occupy it to the extent necessary for the purpose of constructing and maintaining booms on the river adjacent to the land, for the boomage of logs and timber.

In fact, the grant, while more words were used in the conveyance itself, was of no greater rights and privileges than were granted in the deed considered in Farrand v. Clarke, 63 Minn. 181, 65 N. W. 361, where it was held that the rights acquired by such deed were much less than those acquired in certain condemnation proceedings whereby this same defendant company secured the right to flood certain land, and also to occupy it with log jams. That is what defendant now claims to have the right to do under the language of the grant herein involved. The language used does not warrant it, and, as a consequence, no such broad construction can be given to the deed of 1882. It did not give to the grantees or their assigns the right to flood the plaintiff's farm by means of booms and assorting works constructed and maintained down the river, although it did grant the right and privilege of boomage, with its necessary incidents, in the stream where it bordered on his land.

Order affirmed.

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JENNETTE W. HALE v. LIFE INDEMNITY & INVESTMENT COMPANY.[1]

July 17, 1896.

Nos. 10,063—(255).

Life Insurance—Insurable Interest of Creditor—Notes in Lieu of Original Notes.

This is an action on a life insurance policy assigned by the assured to the plaintiff, his creditor, as her interest might appear. *Held*, that the plaintiff had an insurable interest in his life, and continued to hold the policy as security for her debt, although she surrendered the original note evidencing her debt, and took other notes of the assured, and that the evidence was sufficient to sustain a finding that the new notes were taken in lieu, and not in payment, of the original note and debt.

Same—Amount of Recovery—Whole Debt not Due.

Held, further, that the plaintiff, if entitled to recover on the policy, was entitled to the full face value thereof, although a portion of her debt was not due at the time of the trial.

Suicide—Declaration of Intention as Evidence—Remoteness.

Where the issue is whether a person did a certain act,—for example, committed suicide,—his declarations, made at or about the time he is alleged to have done the act, to the effect that he intended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion or misrepresentation. But *held*, in this case, that such declarations made two years before the alleged act were too remote, and the trial court did not err in excluding them.

Life Insurance—Declaration of Assured as to Health—Error Cured by Subsequent Admission of Evidence.

Held, that certain rulings of the trial court, excluding evidence as to the declarations of the assured as to his health made prior to his application, were, if erroneous, corrected by afterwards allowing the defendant to give such evidence.

Same—Evidence in Rebuttal—Statement of Assured as to Intemperate Habits.

The defendant offered in rebuttal certain written statements of the assured as to his intemperate habits. *Held*, that their admission at the time they were offered was a matter of discretion with the trial court, and that it did not err in excluding them.

[1] Reported in 68 N. W. 182.

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Same—Policy—Presumption of Validity.

The court instructed the jury that the presumption was that the policy was valid, until the contrary was made to appear, and added, "This is only one form of saying that the burden of proof rests upon the defendant, and not upon the plaintiff, to show that the policy is not a legal and binding contract, as it purports to be." *Held*, that the instruction, as a whole, was not erroneous.

Same—Warranty by Assured of Truth of Answers.

The assured warranted the truth of his answers made in his application, and the trial court instructed the jury that he was bound to answer accurately so far as he undertook to answer, but that his warranty could not be extended beyond his answers as actually given. *Held*, that the instruction was correct, and that certain requests to charge, which were not in harmony therewith, were properly refused.

Verdict Sustained.

Evidence considered, and *held* that it sustains the verdict.

Appeal by defendant from an order of the district court for Hennepin county, Pond, J., denying a motion for a new trial after a verdict in favor of plaintiff. Affirmed.

The question referred to in defendant's assignment of error No. 20 was if the witness knew whether a premium on another life policy had been paid.

James O. Pierce, for appellant.

F. D. Larrabee and *Shaw, Cray, Lancaster & Parker*, for respondent.

START, C. J.[2] This is an action on a policy of life insurance in the sum of $10,000, issued by defendant to James B. Rouse upon his own life on September 7, 1892, and assigned to the plaintiff. The assured died November 25, 1893; and plaintiff, claiming an insurable interest in his life, made and furnished proofs of his death to the defendant, and demanded payment of the policy to herself, by virtue of such assignment. Payment was refused.

These facts are duly alleged in the complaint. The answer admits the making of the policy, and alleges that the assured committed suicide. This phase of the defense was considered on a former appeal in this case. 61 Minn. 516, 63 N. W. 1108. The answer also alleges, among other defenses, that the warranties on the part of the assured,

[2] Mitchell, J., took no part.

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contained in his application for the insurance, were false in the following particulars: He had been, prior to such application, subject to the disease of dyspepsia, grossly intemperate in his habits as to the use of intoxicating liquors, and addicted to the morphine habit. He was not in a sound physical condition and a fit subject for life insurance, to his own knowledge; and, further, that his answers to questions as to the causes for which he had sought medical advice, and the names of his physicians, were false. The reply denies these allegations of the answer. Plaintiff had a verdict for the full amount of the policy, and the defendant appealed from an order denying its motion for a new trial.

The defendant's assignments of error may be classified under three general heads: The rulings of the trial court as to the admission and rejection of evidence; its rulings in giving and refusing instructions to the jury; the sufficiency of the evidence to support the verdict.

1. Assignments of error 9 and 10 raise the question of the correctness of the trial court in receiving in evidence plaintiff's Exhibits C (the proofs of death) and J (the notes of the assured indorsed to the plaintiff). They were properly received in evidence as tending to establish the plaintiff's cause of action, and that, as a creditor, she had an insurable interest in the life of the assured. Whether she established such interest will hereinafter be referred to.

Alleged errors 14, 15, 16, and 17 challenge the correctness of the ruling of the court in excluding testimony as to the declarations of the assured on the subjects of suicide and his health.

The defendant offered to show by the witness Jaggard that in October and December, 1891, the assured, in connection with a conversation as to his financial condition, said to the witness, in substance, "If you press me now upon that claim which you hold against me, * * * I will commit suicide," and that he further said in that connection, "If at any time I get severely pressed in the future, financially, I will commit suicide." The defendant claims that this was competent evidence on the question whether the assured died by his own voluntary act.

It is true that, when the question is whether a person did a certain act, his declarations, oral or written, made prior to and about the time he is alleged to have done the act, to the effect that he in-

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tended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion or misrepresentation. Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909; Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961. The rule rests upon the basis that where the inquiry is whether a party did an alleged act,—for example, committed suicide,—and there is evidence in the case tending to show that in fact he did do the act, proof that he had formed a previous intention to do it is material and competent, as tending to corroborate such evidence and support the theory of suicide. Such intention is a fact to be proven, and may be established by the declarations of the party made at or about the time it is claimed the act was done. The cases cited fully sustain the rule, and illustrate its limitations. The declarations must, in order to be admissible in evidence, bear a reasonably close relation, in point of time, to the alleged act. The reason for the rule suggests and enforces the necessity of this relation between the declaration of the party, and the doing of the alleged act by him. They must be so near in point of time as to justify a reasonable probability, in connection with the other evidence in the case, that the party in fact carried his declared intention into execution. No definite rule applicable to all cases can be laid down as to when, and when not, such declarations will be received. It is a matter largely in the sound discretion of the trial court in each particular case.

The cases cited and relied on by the defendant are not in conflict with the views we have expressed. In the case of Smith v. National Benefit Soc., 123 N. Y. 85, 25 N. E. 197, a series of acts and declarations of the assured, covering a period of nearly a year before his death, were admitted in evidence in support of the defense that, in pursuance of a deliberately planned scheme to defraud the defendant and other insurance companies, the assured procured insurance on his life in 36 companies to the aggregate amount of $285,000, and consummated the fraud by suicide. The issue was not that he had committed suicide in violation of any stipulations in the policy, for it contained none, but fraud in procuring the policy was the issue, and great latitude was properly allowed in the admission of evidence to prove the fraud. Evidence of continued acts and declarations of the assured up to the day before his death were received as a part of the chain of circumstances tending to prove the fraud, and as a

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part of the history of it; in short, as a part of the res gestæ. The case is so radically different, as to the issues and facts, from the one at bar, that it is not in point. The cases of Hathaway's Admr. v. National Life Ins. Co., 48 Vt. 335, and Hartman v. Keystone Ins. Co., 21 Pa. St. 466, are not relevant to the question we are considering. In the first case the declarations received in evidence were made some two weeks before the assured committed suicide, and were received on behalf of the plaintiff as tending to show that the assured was insane when he committed suicide. In the second case, declarations of the deceased, offered on behalf of the plaintiff to rebut the evidence tending to show suicide, were rejected. The declarations received in Commonwealth v. Trefethen, supra, were made the day before the death of the party making them.

The declarations of the assured here in question were made in the fall of 1891,—a year before the policy was issued, and two years before his death,—and were no part of the res gestæ, and were too far removed in point of time from the death of the assured, to justify any reasonable inference that his death was the execution of such alleged declared intent. The trial court, in its discretion, was fully justified in excluding the evidence of such declarations.

It is further claimed that the court erred in excluding declarations on the subject of his health made by the assured prior to the issuance of the policy.

The first of such alleged errors is the ruling of the court in sustaining an objection to the defendant's question to the witness Jaggard, who testified that he met the assured in the fall of 1891. The question was, "You may state what he stated to you in regard to the condition of his health at that time." Other than as may be inferred from the question, the record does not disclose what declarations of the assured the defendant desired to prove.

Whether the ruling on this particular question was correct or not, we need not stop to inquire; for it appears from the record that the witness was subsequently, and during his examination in chief, allowed to, and did, testify fully as to the subject-matter of this question. The witness testified that he had seen the assured when he was sick, and described his appearance and symptoms, and continued as follows:

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"Q. Did he make any complaint as to whether he was suffering? A. Yes, sir. Q. What did he say with reference to his sickness, if anything? A. I asked Mr. Rouse, on a number of times, what was the matter with him. I might say, and he replied a number of times to me, that he had been prostrated by nervous dyspepsia. Q. Did he complain of any particular pain at any of these times,—I am confining myself now to Minneapolis? A. Except as I have stated, I don't recall. Q. Did he at the same time state what the length or duration of this nervous dyspepsia had been? A. Yes; I think he did. I think Mr. Rouse talked to me pretty freely about his physical condition."

The witness gave further testimony along the same line, and the whole subject of the assured's health, and his statements as to the same, appear from the record to have been gone into just as fully as the defendant desired.

The defendant, however, now claims that the evidence admitted "was far from identical with that sought to be introduced and excluded." This may be true, but we can only deal with the record, and, in the absence of any offer or statement as to what was sought to be proven by the question, the objection to which was sustained, it clearly appears that the ruling of the court, if error, was harmless, for the reasons suggested.

For similar reasons, there was no error in sustaining the objection to the question to the witness Green, which was as follows: "Did you have any talk with Rouse, or did he made any statements to you, concerning his condition of health that day?" This was merely a preliminary question, and wholly immaterial, unless, in case of an affirmative answer, it was followed by the further question as to what the statements were. Assuming—what does not appear from the record—that it was the purpose of the defendant to follow the question with others, for the purpose of eliciting material evidence, we are of the opinion that the question was substantially answered in response to the two questions which immediately followed: "Q. Did you observe anything concerning his condition of health or strength on that day? A. No, sir. Q. Did he make to you any complaints of any physical sufferings or ailments on that occasion? A. No, sir."

One of the defendant's witnesses (Sniffen) testified that he visited and saw the assured on several occasions in the year 1891, when he

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appeared to be sick; and the witness was asked what the assured stated, on each of the occasions, as to the nature of his illness. The form of the question was substantially the same in each case, and was, "What did he say, if anything, about the nature of his illness?" The court sustained the plaintiff's objections to these questions. But the witness was permitted afterwards to, and did, answer the questions fully; and if the original ruling was error it was corrected, and the defendant was not prejudiced. But the defendant claims that what was subsequently testified to by the witness was not all that the assured said as to his then present condition of health. The record does not justify the claim. The subsequent testimony referred to is as follows:

"Q. During the different times that you saw Mr. Rouse sick in the year 1891 and in January, 1892, did Mr. Rouse say anything to you about the nature of his illness? The Court: I want the witness to understand that he is to tell what Mr. Rouse said he was then suffering with. Witness: That is what I understand the question. The Court: That is, upon these occasions when you found him sick as you have described him. Witness: Yes, sir. Q. What did he say he was suffering with? A. His 'old stomach trouble.' Q. Did he say that upon each of the times that you saw him in the year 1891? A. No, sir. Q. Which of these occasions did he say that? A. On the majority of them. He always referred to stomach trouble. When he was at my house, for instance, he had to open his vest, complaining that he couldn't stand the pressure on his stomach. He complained of dyspepsia, and of cramps, severe cramps, but invariably it was referred to as 'stomach trouble.' Q. Yes; stomach trouble,—the old stomach trouble? A. Yes; stomach trouble. He told me that in the Holmes Hotel, the first time I wanted to have a physician in the New York Life attend him. He said, 'No;' he knew just what to do for it. Q. Now, what did he say at that time about its duration? (Same objection.) The Court: That comes within the rule. He may answer to show knowledge that he had this trouble. A. He stated specifically that he had had it for a long time. Q. Now, did he state that at each of the times when you saw him in March, April, June, and October, 1891? A. Yes, sir; he stated literally that. It might have been the difference of a line, but he stated literally the same thing, because I continued the conversation. 'How are you feeling?' or 'How are you getting along?' or something of that sort."

The witness gave further testimony as to the assured's then physical condition, and his statements as to such condition, and there is no suggestion that he did not testify to all that the assured said to him. If it was error to sustain the objections to the original ques-

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tions, the error was cured by subsequently permitting the witness to testify fully in the premises. Merriam v. Pine City Lumber Co., 23 Minn. 314.

The defendant offered in rebuttal certain written statements made by the assured to the Keeley Institute relating to his intemperate habits. The offer was objected to on the ground, among others, that it was not proper evidence in rebuttal, and the court sustained the objections. This ruling is the basis of defendant's assignments 18 and 19. The offered evidence, if admissible at all, should have been offered as original evidence in support of the defendant's main case in its defense. It was not proper rebuttal evidence, and whether it should have been received at the time it was offered, because of the fact that the defendant did not discover its existence until after it rested its defense, was a matter resting in the discretion of the trial court. It was not an abuse of the discretion to refuse to receive it.

Assignment 20 is not regardable. The ruling complained of was correct for the reason that the question was not proper cross-examination.

2. Assignments of error 6 and 7 relate to the instruction of the court, and its refusal to instruct, as to the plaintiff's insurable interest in the life of the assured.

The policy was assigned by Rouse to the plaintiff as her interest might appear. There is evidence in the case tending to show that the plaintiff held the note of her son-in-law, Woodruff, indorsed by Rouse before its delivery, for the sum of $10,000 loaned by her to Woodruff to enable him to purchase a one-half interest in Rouse's business, which he did. The assignment in question was made to the plaintiff to secure this debt. Subsequently Rouse repurchased the interest sold to Woodruff, and executed to him therefor 100 notes of $100 each, which Woodruff indorsed to the plaintiff, and his $10,000 note, with Rouse's indorsement thereon, was surrendered.

The defendant claims that this transaction constituted a payment of Rouse's original debt, which the policy was given to secure, and her insurable interest ceased. The plaintiff claims that Rouse's liability on the original debt was never paid, but that the new notes were substituted in place of the old one. The trial court instructed the jury, in substance, that the burden was upon the plaintiff to establish her claim that the new notes were taken as a substitute for

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the old one of $10,000, and that she continued to hold the policy as security for the payment of the new notes up to the date of Rouse's death; that, if the plaintiff had failed in this, she could not recover; but, if the new notes were so substituted for the old one with the consent of the parties, then the plaintiff was entitled to recover, unless the defendant had established one or more of its affirmative defenses. If there is evidence in the case fairly tending to support this claim of the plaintiff, the court did not err, either in the instruction given, or in refusing the defendant's requested instruction. We have examined the evidence on this point, and are of the opinion that the evidence justified the instructions of the court.

The court also instructed the jury that, if the plaintiff was entitled to recover anything, she was entitled to the face value of the policy, and interest, and refused the defendant's request to limit the amount of the recovery to the amount actually due on her notes at the commencement of this action, or at the time of trial. This is the basis of the defendant's assignments of error Nos. 11, 12, and 13.

The instruction and ruling of the court were correct. The amount of the plaintiff's notes against the assured exceeded the face of the policy. But the defendant claims that, although the plaintiff established the fact that she held the policy to secure her debt, yet she was not entitled to recover the full amount of the policy, because the larger portion of her notes had not matured at the time of the trial. Whether the notes were due or not is no concern of the defendant. That is a matter to be adjusted between the plaintiff and the personal representatives of the deceased. The cause of action is not on the notes, but on the policy. That was due when the action was commenced, and the cause of action thereon against the defendant is single, and not divisible into as many separate causes of action as the plaintiff held notes against the assured. The whole of the plaintiff's notes, due or to become due, were secured by the policy; and, when she collects the amount due from the defendant on the policy, questions as to its application or retention as security for notes not due, in place of the policy, do not interest the defendant. Even if the amount of the plaintiff's notes was less than the face of the policy, she would be entitled to recover the full amount due on the policy, and would hold the surplus for the personal representatives of the assured. Bliss, Ins. § 328.

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The trial court also instructed the jury, in effect, that the presumption was, until the contrary was made to appear, that the policy was a valid legal instrument, and binding upon the defendant, and in the same connection said, "This is only one form of saying that the burden of proof rests upon the defendant, and not upon the plaintiff, to show that the policy is not a legal and binding contract, as it purports to be." The defendant excepted to so much of the instruction as stated that a presumption exists that the policy is a binding contract upon the defendant until the contrary appears. The charge, as a whole, was correct. The court stated to the jury exactly what he meant, by saying that the policy would be presumed to be valid until the contrary appeared. The burden was on the defendant to make the contrary appear. Chambers v. Northwestern M. L. Ins. Co., 64 Minn. 495, 67 N. W. 367.

Alleged errors Nos. 3 and 4 are to the effect that the court erred in refusing the defendant's first and second requests for instructions to the jury. These requests are practically the same, and refer to the claim of the defendant that assured gave false answers to questions put to him by its medical examiner as to the physicians he had consulted, and for what ailments.

For a clear understanding of the questions raised by these requests, it is necessary first to refer to the application of the assured, which contained the questions and answers upon which the requests were based. It was agreed by the assured that all the statements and answers made by him in his application, as well as those made to the defendant's medical examiner, were warranted by him to be true. There was no warranty that the answers were full and complete, but he did warrant that the answers, as given, were true. Under this agreement the assured was bound to answer accurately and truthfully only in so far as he undertook to answer, and his warranty could not be extended beyond his answers so actually given. If a question was not answered, there was no warranty, and, if only partially answered, the warranty cannot be extended beyond the answer, for it can only be predicated on the affirmation of something not true. Dilleber v. Home Life Ins. Co., 69 N. Y. 256.

The trial court instructed the jury in accordance with these views, the correctness of which is practically conceded by defendant; but it is claimed that they have no application to this case, because the as-

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sured in his answers to the questions as to what physicians he had consulted, and what for, stated, in effect, that those named were the only ones that he had consulted; hence, if in fact he had consulted others, there was a breach of his warranty that those named were all of the physicians consulted. Even if this is a proper construction of the assured's answer, still, as we shall presently see, the rule we have stated is a conclusive answer to the claim that it was error to refuse the defendant's first and second requests.

The application consisted of two parts, one on each side of the same sheet of paper. The first part consisted of questions and answers to and by the assured. The second part was the report of the defendant's medical examiner, which also consisted of questions to and answers by him. Question No. 12, in part 1, and its answer, were substantially as follows: "For what have you sought medical advice during the past seven years? Dates? Duration? Physicians consulted? Answer. Malaria in Kansas, and la grippe,—first, 1888; second, 1891. One week, malaria. Dr. J. S. Oldham. La grippe, one week. Dr. Anderson." Under the head of "Remarks" the assured further stated as follows: "In 1891 had enlargement of liver, lasting four months. The principal effect was that of indigestion. Fully recovered." Subdivision No. 15 of the medical examiner's report contained the following question and answer: "When and for what has medical advice been sought within the last three years? Answer. Only as stated above."

The claim of the defendant is that this answer must be read into the answer to question No. 12, so that his answer as to what physicians he had consulted must be construed as if it read only Dr. Oldham in 1888, and Dr. Anderson in 1891. This is not the reasonable construction of these answers. The question to the medical examiner did not call for the names of the physicians consulted, but only for the time when, and the ailment for which, medical advice had been sought, and the answer, "Only as stated above," refers to his previous statements as to the subject-matter of the question, viz. for la grippe in 1891, and for enlargement of liver in 1891, resulting in indigestion.

But, as already suggested, the requests for instructions now under consideration were properly refused, upon the defendant's own

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construction of these answers in the application. As the requests refer to the same subject, and the defendant claims that at least the second one should have been given, it is only necessary to here quote the second, which was in these words:

"If you find that James B. Rouse, in answer to the question put to him by the medical examiner who made examination for insurance with reference to the policy here sued on: '(a) For what have you sought medical advice during the past seven years? (b) Dates? (c) Duration? (d) Physician consulted?'—stated that he had sought medical advice of Dr. J. E. Oldham in 1888 for malaria, and of Dr. Anderson in 1891 for la grippe, and made no further answer, and if you further find that said Rouse had, at any time within seven years to the said medical examination and his giving said answers, sought medical advice from, and had been treated by, any other physician or physicians than those named by him, you are instructed that the facts so found by you vitiated and rendered void the contract of life insurance sued on in this case, and your verdict will be for the defendant."

It is apparent on the face of this request that it does not state the law applicable to this case correctly; for, if the assured made "no further answer" to the question referred to in the request, it follows that he did not answer that the physicians named were the only ones whom he had consulted within seven years, and his warranty could not be extended beyond his answer as given. If, as the defendant claims, the answer to the question to the medical examiner, "When and for what has medical advice been sought within the last three years?" "Only as stated above,"—so qualified the answer to the question recited in the request that it was the equivalent of a statement that he had sought within the last three years medical advice only of the physicians named in his answer, the words, "No further answer," should have been omitted, and the question of the medical examiner, and answer thereto, in substance or effect, should have been included in the request, and the time limit within which the assured sought advice from other physicians should have been three, instead of seven, years. The words in the request, "and made no further answer," negative the idea that the instruction rested on any other answer except the one therein recited.

The requests were properly refused for both reasons which we have suggested.

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3. The remaining assignments of error meriting consideration relate to the sufficiency of the evidence to support the verdict. The volume of the evidence forbids any extended analysis of it.

The claim of the defendant is that the assured, prior to his application for insurance, was subject to the disease of dyspepsia; that he was a man grossly intemperate in his habits, addicted to both the drink and morphine habit, and was not, to his own knowledge, a fit subject for life insurance, and that this claim was established on the trial by clear and uncontradicted evidence; and that, therefore, the court erred in its refusal to dismiss the action at the close of the plaintiff's evidence, and also in refusing to direct a verdict for the defendant at the close of the evidence. If the defendant's premises are correct, its conclusion follows as a logical sequence. Its premises, however, rest upon the assumption of the absolute credibility of its witnesses, and that there was no contradictory evidence.

The subject of the inquiry related to the habit of eating opium or morphine, not to the proper occasional use of the drug, and to his habit or practice of immoderate drinking or overindulgence in liquors, and not to the moderate use of them. The defendant introduced evidence tending to show specific acts and declarations on the part of the assured, and other evidence as to his physical condition, which, if absolutely credible and uncontradicted, would justify, if not require, the jury to find that he was addicted to the drink and morphine habit, and did have the dyspepsia, when he made his application. But the credibility of several of the defendant's witnesses cannot be assumed, for the record discloses circumstances connected with them and their evidence which made the question of their credibility one for the jury. A large part of the evidence on the part of the plaintiff, of necessity, was general in its character, and consisted of the testimony of the wife of the assured, his intimate friends, and business and social associates, including doctors, and a druggist who knew him intimately, and his habits, tending to show the state of his health, and that he was not addicted to the drink or morphine habit. The plaintiff also gave evidence tending to contradict the testimony of some of the defendant's witnesses as to certain alleged specific acts of excessive drinking on the part of the assured, by showing that he was not present at the time and place stated.

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The defendant claims that the general evidence we have referred to was purely negative, and must be disregarded, because it does not directly contradict its evidence as to specific acts of the assured. The evidence given by the plaintiff was certainly competent. It tended indirectly to contradict the evidence on the part of the defendant, for it tended to show that it was improbable that the assured conducted himself as charged, and was addicted to the drink and morphine habit. It was a question for the jury to determine whether a man could be addicted to these habits, and grossly intemperate, and his family and his intimate business and social associates not discover them. It cannot be assumed that he could have thus concealed these habits, if he in fact had them, for as surely as the dyer's hand is subdued to what it works in will the drink or opium habit proclaim itself in its victim's face and form. Outraged nature places an indelible and legible mark of identification upon the opium eater and the drunkard, and he cannot long conceal his identity.

We are of the opinion that the trial court did not err in refusing to take this case from the jury, and that the verdict is sustained by the evidence.

Order affirmed.

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ACCEPTANCE. See "Sale," 89, 377.

ACCORD AND SATISFACTION.

Where plaintiff, without reading, signed a pay roll, acknowledging receipt in full of wages due from defendant and assenting to deductions for damages to property, the evidence sustained a finding and conclusion that there was no accord and satisfaction as to defendant's claim for damages.

—Hennessy v. St. Paul City Railway Co..... 13

ACCOUNT. See "Appeal," 335; "Assignment," 497.

ACKNOWLEDGMENT. See "Pleading," 240.

ACTION. See "Adverse Claims to Real Estate," 466; "Carrier," 540; "Constitution," 310; "Conveyance," 115; "Corporation," 90, 139, 432; "Covenant," 531; "Election," 292; "Execution," 84; "Insolvency," 409; "Insurance (Life)," 548; "Jurisdiction," 48; "Mortgage," 133, 315, 471, 537; "Municipal Corporation," 347; "Pledge," 364, 439; "Sale," 377, 480; "Statute of Limitations," 391.

ADMISSION. See "Partnership," 162.

ADVERSE CLAIMS TO REAL ESTATE.

Plaintiff, having a lien, which he claimed had ripened into title, brought action to determine adverse claims, and, after findings against him and an order of dismissal, he obtained additional findings declaring his lien valid and superior to the lien of defendant's mortgage, pursuant to which judgment was entered. Between the trial and plaintiff's application for additional findings, his lien had in fact ripened into title and cut off defendant's lien. *Held*, that such judgment, though irregular, was valid, and was an adjudication that plaintiff had no title, and estopped him from asserting in a subsequent action to determine adverse claims that he had such title or that defendant's lien was cut off.

—Eide v. Clarke..... 466

Plaintiff, being in possession, had a right to maintain the first action to determine the validity of defendant's lien, but not to determine the priority of liens upon a title under which he did not claim to hold.

—Eide v. Clarke..... 466

See "Pleading," 191.

ADVERSE POSSESSION. See "Possession," 500.

AFFIDAVIT. See "Contempt," 146; "Mortgage," 133, 537.

AITKIN COUNTY. See "Counties and County Officers," 243.

AMENDMENT. See "Courts (Probate)," 60; "Pleading," 429, 489; "Statute," 367.

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ANSWER. See "Pleading," 9.

APPEAL.

An appeal lies from a judgment modified according to directions on a former appeal, though the time for appealing from the original judgment has expired.

—Malmgren v. Phinney..... 25

On the second appeal no matters can be reviewed which were or might have been reviewed on the former appeal.

—Malmgren v. Phinney..... 25

Where the judgment contains distinct directions as to the application of proceeds of sale to the payment of lien claimants, a general assignment that the court erred in the application of the proceeds is insufficient to call in question the correctness of the judgment as to the order of sale or the application of the proceeds.

—Malmgren v. Phinney..... 25

Where the court made eleven findings of fact and the motion for new trial was on four grounds, neither an assignment of error that the findings of fact were not justified by the evidence, nor one that the court erred in denying a motion for a new trial, was sufficient to present for review any specific error.

—Mahler v. Merchants National Bank..... 37

The effect of a decision on appeal reversing judgment was not to grant a new trial, but to remand the cause, leaving the trial court free to proceed in any way not inconsistent with the opinion; and on the findings, which were not disturbed, defendants were entitled to judgment.

—Kurtz v. St. Paul & Duluth Railroad Co..... 60

Where separate requests, each containing but a single proposition of law, are given to the jury without comment, an exception to "each of them" is sufficient.

—Van Doren v. Wright..... 80

Issues of law or fact not passed on by the trial court will not be decided on appeal.

—Woodbridge v. Sellwood..... 135

Where there is no settled case or bill of exceptions, the finding of the court will be presumed to be upon sufficient evidence.

—Woodbridge v. Sellwood..... 135

An order granting a creditor in insolvency proceedings leave to file his claim for allowance after expiration of the time limited is not appealable, since it can be reviewed on appeal from the judgment establishing the claim.

—Richter v. Merchants National Bank..... 237

G. S. 1894, § 4665, providing for an appeal from an order of the probate court allowing, or refusing to allow, a guardian's account, applies to the annual and final accounts provided for in sections 4572 and 4573.

—Watson v. Watson..... 335

G. S. 1894, § 4665, does not allow an appeal from an order based on a finding that an alleged accounting between a guardian and his ward, after the latter became of age, had never been had.

—Watson v. Watson..... 335

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APPEAL—Continued,

The only mode of reviewing a tax judgment, real or personal, in the proceedings on which it is based, is upon a certificate or statement, as prescribed by G. S. 1894, § 1589.

—State v. Faribault Waterworks Co..... 345

Where the court assigns an insufficient reason in support of an order granting a motion for a new trial on the ground of errors of law occurring at the trial and excepted to, the order will not be reversed on appeal if such errors occurred.

—Morrow v. St. Paul City Railway Co..... 382

Where the answer alleged that one from whom defendant obtained stock represented it as fully paid and that defendant relied thereon, a finding that such allegations were not sustained was not so manifestly and palpably against the evidence as to be set aside on appeal.

—Basting v. Northern Trust Co..... 495

In an action for recovery of real property, where the court was equally divided and appellant was entitled to a second trial on complying with the statute, *held* that a reargument should be denied and the order denying plaintiff's motion for a new trial affirmed.

—Great Northern Railway Co. v. Stewart..... 514

Where at the close of plaintiff's evidence the court on defendant's motion dismissed the action, an order denying a motion for a new trial will not be reversed on appeal merely because plaintiff was entitled to nominal damages.

—United States Express Co. v. Koerner..... 540

See "Charge of Court," 442; "Costs," 439; "Estate of Decedent," 162; "Judgment," 90; "Practice," 447.

ARREST. See "Master and Servant," 256.

ARTICLES OF ASSOCIATION. See "Evidence," 249.

ASSESSMENT FOR LOCAL IMPROVEMENT.

Sp. Laws 1891, c. 12, § 5, does not require the treasurer of the city of St. Paul, when making his report to the district court and demanding judgment for an unpaid special assessment, to file in court the warrant for collection.

—Rogers v. Heyderstaedt..... 229

See "Municipal Corporation," 298, 347.

ASSIGNMENT.

An order directing payment of an account to the person to whom it is delivered operates as an assignment of the account, though not accepted by the debtor, and is valid against a subsequent garnishment.

—Union Iron Works Co. v. Kilgore..... 497

See "Insurance (Life)," 548; "Mortgage," 471, 475.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See "Insolvency," 156, 184, 409; "Insurance (Credit)," 283.

ASSIGNMENT OF ERROR. See "Appeal," 25, 37.

ASSOCIATION. See "Insurance (Life)," 187.

ASSUMPTION. See "Mortgage," 489.

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ATTORNEY AT LAW. See "Mortgage," 153, 315.

AWARD. See "Practice," 295.

BALLOT. See "Election," 292.

BANKS AND BANKING. See "Corporation," 90, 139; "Criminal Law," 121.

BILL OF EXCEPTIONS. See "Appeal," 135.

BOILER INSPECTORS' ACT.

Under G. S. 1894, § 493, providing that the act known as the "Boiler Inspectors' Act" "shall not apply to railroad locomotives, nor shall engineers employed by railroad companies be required to procure licenses," only locomotive engineers are exempt.

—State v. McMahon..... 453

Under G. S. 1894, § 493, providing that such act shall not apply to "boilers inspected by insurance companies and certified by their authorized inspectors to be safe," only such boilers are exempt as have been inspected by duly authorized companies whose business is to insure boilers within the state.

—State v. McMahon..... 453

G. S. 1894, § 493, is not unconstitutional, as unequal, partial, or class legislation.

—State v. McMahon..... 453

BOND. See "Carrier," 540; "Election," 292; "Master and Servant," 321; "Municipal Corporation," 292; "Principal and Surety," 426.

BROKER.

Where a real estate broker was to receive a commission if he found a purchaser, but his agency was not exclusive, and he found a purchaser, but before he had notified his principal the owner had sold to another purchaser, the broker was not entitled to a commission.

—Baars v. Hyland..... 150

CARRIER.

Defendant contracted to transport live stock to a point beyond its line, beyond which the transportation was to be by connecting carrier. The contract provided that, as a condition to recovery for loss or injury, the shipper should give notice of his claim to some officer of defendant, or its nearest station agent, before removal of the stock from the place of destination or delivery, and before it was mingled with other stock. It did not appear that defendant had an officer or agent at such place. *Held*, that the condition was unreasonable and void.

—Engesether v. Great Northern Railway Co..... 168

In an action for damages alleged to have resulted from a fall caused by the negligence of defendant street railway company while plaintiff was alighting from its car, the court erred in refusing to charge that if plaintiff fell by reason of getting off the car while it was slowing down for the purpose of stopping, she could not recover.

—De Foe v. St. Paul City Railway Co..... 319

Where defendant delivered to plaintiff express company for carriage a package containing registered bonds of the value of $234,000, informing it that the value was $1,000 and concealing that they were of greater value, and paid the usual price for carrying packages of the declared value, plain-

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CARRIER—Continued,
tiff was not entitled to recover additional compensation on the theory that in case of loss the limit of its liability was $234,000.
—United States Express Co. v. Koerner..... 540
In such case, plaintiff would be entitled to recover compensation for any increased risk within the limit of $1,000.
—United States Express Co. v. Koerner..... 540

CERTIFICATE. See "Corporation," 324; "Municipal Corporation," 347; "Pledge," 364.

CHARGE OF COURT.
In an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant employer, a street railway company, where the only acts of negligence alleged were that defendant employed an incompetent gripman and provided insufficient appliances, it was error to submit to the jury the question whether defendant furnished intestate a safe place to work.
—Morrow v. St. Paul City Railway Co..... 382
Where the court charged as to the law of custom or usage applicable to the evidence, an exception "to the explanation and enunciation of the law of custom and the application thereof, as applied to the facts," was too general, and of no avail.
—Finance Co. v. Old Pittsburgh Coal Co..... 442
It is not error to refuse to give a requested instruction, if it is a repetition of a part of the charge.
—Finance Co. v. Old Pittsburgh Coal Co..... 442
See "Carrier," 319; "Criminal Law," 230; "Insurance (Life)," 548; "Master and Servant," 355; "Railway," 112.

CHATTEL MORTGAGE. See "Insolvency," 409.

CLASS LEGISLATION. See "Boiler Inspectors' Act," 453; "Constitution," 196; "Grain Elevator," 515.

COLLATERAL ATTACK. See "Plat," 491.

COLLATERAL SECURITY. See "Insurance (Life)," 548; "Pledge," 439.

COMPLAINT. See "Election," 292; "Negotiable Instrument," 346; "Pleading," 90, 429; "Sale," 377.

CONCEALMENT. See "Carrier," 540.

CONDEMNATION. See "Practice," 295.

CONDITION. See "Carrier," 168; "Corporation," 432; "Municipal Corporation," 347.

CONSIDERATION. See "Landlord and Tenant," 413; "Statute of Frauds," 104.

CONSTITUTION.
Laws 1895, c. 328, providing for struck juries, is not in conflict with the constitutional provisions that "the right of trial by jury shall remain inviolate" or "that every person * * * ought to obtain justice freely and without purchase"; nor is it unconstitutional as "class legislation."
—Lommen v. Minneapolis Gaslight Co..... 196

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CONSTITUTION—Continued,

Laws 1895, c. 249, providing for location of section and quarter section corners by the county surveyor on application of resident owners of the section, and for assessment of the costs of survey on the land, is unconstitutional, as depriving the landowners of their property without due process of law.

—Davis v. Board of County Commissioners..... 310

The validity of said act cannot be sustained on the ground that it is an exercise of the power of taxation.

—Davis v. Board of County Commissioners..... 310

A county surveyor could not recover from the county compensation for locating corners under said act, though it provides for his payment by the county.

—Davis v. Board of County Commissioners..... 310

Laws 1885, c. 170 (G. S. 1894, § 3813), providing for dissolution of independent school districts, is not unconstitutional as being a delegation of legislative powers.

—State v. Cooley..... 406

Laws 1878, c. 53 (G. S. 1894, §§ 6028–6052), "An act providing for the foreclosure of mortgages by advertisement," is not unconstitutional because of section 24 (G. S. 1894, § 6052), as embracing more than one subject or a subject not expressed in the title.

—Lynott v. Dickerman..... 471

See "Boiler Inspectors' Act," 453; "Corporation," 249, 263, 281, 324; "Grain Elevator," 515; "Insurance (Life)," 187; "Taxes," 525.

CONTEMPT.

In criminal contempt the rules of evidence and presumptions of law applied in criminal cases should be observed.

—State v. District Court of Hennepin County..... 146

Where relator was convicted of criminal contempt, not committed in presence of the court, for approaching and attempting to influence a juror, the affidavit which was the basis of the proceedings was sufficient, though it did not directly charge that relator knew that the person approached was a juror.

—State v. District Court of Hennepin County..... 146

CONTRACT.

Where the parties entered into a written contract for sale of a machine, it was competent for the buyer to prove by oral evidence that it was agreed as part of the same transaction that the sale of another machine should be rescinded and that a note given for its price should be retained by the seller on account of the price of the new machine.

—Lynch v. Curfman..... 170

A contract between plaintiff and defendant city provided that plaintiff should be paid a gross sum for building sewers on their completion and acceptance; that estimates should be granted during the progress of the work, which should be paid when there was money in the treasury applicable to such payment; but that no interest should be allowed on them. During the progress of the work estimates were allowed, but no warrants were issued therefor, and no payment was made until after the work was completed and accepted, and the amount due allowed, when warrants were issued from time to time, and paid to the amount of the estimates: *Held*, that plaintiff was en-

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CONTRACT—Continued,
titled to interest on the debt, including the amount of the estimates from the completion and acceptance.
—J. D. Moran Mnfg. & Const. Co. v. City of St. Paul..... 300
To establish a contract of sale by the letters of the parties, it must appear that there was a clear accession on both sides to the same terms.
—Ames & Frost Co. v. Smith..... 304
See "Carrier," 168; "Equity," 277; "Evidence," 394; "Illegality," 135; "Landlord and Tenant," 413; "Master and Servant," 321; "Partnership," 9; "Sale," 148, 273, 377, 449, 480; "Statute of Frauds," 104.

CONTRIBUTION. See "Conveyance," 457.

CONTRIBUTORY NEGLIGENCE. See "Master and Servant," 337; "Negligence," 355.

CONVERSION. See "Evidence," 473; "Pledge," 364.

CONVEYANCE.
Surrender of possession by the grantee in a deed containing the usual covenant of warranty because of judgment in favor of the holder of a paramount title is a constructive eviction; and thereupon the right of action for breach of covenant is complete.
—Wagner v. Finnegan..... 115
On the evidence it was error to deny plaintiff's motion for an additional finding as to whether he and another surrendered possession because of judgments in favor of the holder of a paramount title.
—Wagner v. Finnegan..... 115
A., the life tenant, and B., the reversioner, who were erecting the first and second stories of a building on the premises, conveyed to C., as trustee for plaintiff, the third story, which it was then erecting under a license from them, B. covenanting to build and forever maintain the roof and C. covenanting to pay a perpetual annual rent. B. built the roof, and A. and B. then conveyed the premises (except the third story) in fee to defendants, and C. conveyed the third story to plaintiff. In course of time plaintiff was compelled to rebuild the roof. *Held*, that plaintiff was not entitled, during the life of A., to have the cost of the roof declared a lien on the interest of defendants, who were still in possession under the life estate and not under the reversion, and could only compel contribution from defendants of their share of the cost.
—Rochester Lodge v. Graham..... 457
Distinction noted, in respect to covenants running with the land, between a conveyance in fee reserving rent and a lease for life or years.
—Rochester Lodge v. Graham..... 457
A deed whereby plaintiff and his wife granted to defendant's remote grantor certain boomage rights and privileges in a stream bordering their farm did not grant the right to maintain booms and works several miles down the stream whereby the water was set back so as to flood the farm.
—Rasicot v. Little Falls Improvement & Navigation Co..... 543
See "Execution," 84; "Insolvency," 184; "Trust," 71.

CO-OPERATIVE OR ASSESSMENT LIFE INSURANCE ASSOCIATION. See "Insurance (Life)," 187.

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CORONER.

Under G. S. 1894, § 5554, where the coroner on the same day makes two examinations of different dead bodies, or holds an inquest on one and makes an examination of the other, he is only entitled to five dollars per day "for the time actually spent."

—Kistler v. Board of County Commissioners..... 262

CORPORATION.

Where the receiver of a corporation sold property without payment of the price and in an action against plaintiff and others on an undertaking to secure such price obtained judgment, in another action on behalf of himself and other stockholders to recover the property for the benefit of creditors and stockholders and for personal judgment against the receiver and the purchaser for any deficiency plaintiff was not entitled to an injunction restraining the receiver from entering judgment on the verdict in the former action.

—Tozer v. O'Gorman..... 1

A brewing company *held* a manufacturing corporation, so that its stockholders were not liable for its debts beyond the amount due on their subscriptions.

—Hastings Malting Co. v. Iron Range Brewing Co..... 28

The issue by a corporation of full paid shares for property at a material overvaluation to the knowledge of the parties is fraudulent as to its subsequent creditors without notice, and if it becomes insolvent such creditors may charge its shareholders so paying for their stock with the difference between the real value of the property and the par value of their stock.

—Hastings Malting Co. v. Iron Range Brewing Co..... 28

Where the business of defendant corporation was discontinued to save loss, and its directors with the approval of all stockholders except plaintiff exchanged part of the plant for shares of another corporation, and plaintiff was fully advised, though not before the exchange was completed, and did not object for more than two years, during which the directors sold the rest of the plant and paid the debts, plaintiff could not maintain an action to recover from the directors and corporation his share of the value of the property exchanged.

—Pinkus v. Minneapolis Linen Mills..... 40

In such case, where the affairs of the corporation were being managed for the best interests of all concerned, plaintiff was not entitled to have a receiver appointed.

—Pinkus v. Minneapolis Linen Mills..... 40

Where a creditor of an insolvent banking corporation institutes an action against it under G. S. 1894, c. 76, §§ 5900, 5901, and secures the appointment of a receiver, but does not bring in the stockholders, any creditor may, on an ex parte application showing the necessity, obtain an order allowing him in behalf of himself and other creditors to intervene and file a complaint making the stockholders defendants for the purpose of determining their statutory liability.

—Palmer v. Bank of Zumbrota..... 90

As to the sufficiency of allegations in the complaint of such intervening creditor in respect to the entry of judgment against the insolvent corporation.

—Palmer v. Bank of Zumbrota..... 90

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CORPORATION—Continued,

Where such intervening creditor has brought in the stockholders, there is but one action pending; nor need the insolvent corporation be named as defendant in the intervenor's complaint or again be served with summons.
—Palmer v. Bank of Zumbrota..... 90

Where in the interlocutory judgment entered against the insolvent corporation for want of answer the receiver was erroneously directed to proceed by suit against the stockholders to determine their statutory liability, such error was cured by a subsequent order authorizing such intervening creditor to bring in the stockholders.
—Palmer v. Bank of Zumbrota..... 90

Where the creditors of an insolvent corporation, in response to an order under G. S. § 5911, have filed their claims in the form of an intervenor's complaint, they become parties, and an order making them parties is unnecessary, although such order is not an abuse of discretion.
—Palmer v. Bank of Zumbrota..... 90

A complaint in intervention which brought in a certain person as defendant, as the executor of decedent stockholder and as trustee of his estate, but did not bring in the cestui que trust, was not on that ground demurrable for failure to state a cause of action.
—Palmer v. Bank of Zumbrota..... 90

Under G. S. 1894, §§ 5900–5903, a creditor of a banking corporation may, without first obtaining judgment against it, maintain an action in behalf of himself and all other creditors, who may choose to become parties, to enforce the statutory liability of its stockholders.
—American S. & L. Assn. v. Farmers & M. S. Bank..... 139

G. S. 1894, § 5904, merely extends the remedy to creditors who may choose first to proceed to judgment against the corporation.
—American S. & L. Assn. v. Farmers & M. S. Bank..... 139

In an action by a judgment creditor under G. S. 1894, c. 76, for sequestration of the assets of a corporation and appointment of a receiver, plaintiff's judgment is conclusive on the stockholders and the corporation, unless impeached for fraud in a direct proceeding.
—Oswald v. Minneapolis Times Co..... 249

The findings were insufficient to show that the claims of certain creditors, when contracted, exceeded the limit of indebtedness fixed by the articles of association.
—Oswald v. Minneapolis Times Co..... 249

The constitutional liability of stockholders for corporate debts extends to debts due stockholders.
—Oswald v. Minneapolis Times Co..... 249

There was a sufficient transfer of stock and recognition of the relation of stockholder by the corporation and the transferee to constitute the latter a stockholder. (Following Basting v. Northern Trust Co., 61 Minn. 307.)
—Oswald v. Minneapolis Times Co..... 249

Under Const. art. 10, § 3, providing that "each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of" his

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CORPORATION—Continued,

stock, a mechanical business is one closely allied with, or incidental to, some kind of manufacturing business.
—Cowling v. Zenith Iron Co..... 263

The mining of iron ore is such a mechanical business.
—Cowling v. Zenith Iron Co..... 263

Where a corporation is organized under Laws 1876, c. 28, and the acts amendatory thereof (G. S. 1894, §§ 2827–2837), section 8 whereof provides that "any corporation organized under this act may take, acquire and hold stock in any other corporation, if a majority in amount of the stockholders shall so elect," this section does not prevent it from being a corporation whose stockholders are exempt under Const. art. 10, § 3, if it does not take the benefit of the section.
—Cowling v. Zenith Iron Co..... 263

Where the articles of incorporation provided that the business should be "mining, smelting, reducing * * * iron, copper and other minerals * * *; also buying, selling, leasing and dealing in mineral lands for the above purposes," the corporation was not organized to carry on an exclusively mechanical business so as to entitle its stockholders to exemption from double liability within Const. art. 10, § 3.
—Anderson v. Anderson Iron Co..... 281

So far as G. S. 1894, § 2829, exempts from such liability stockholders of corporations organized for the purpose of buying, selling and dealing in mineral lands, as provided in section 2827, it is unconstitutional.
—Anderson v. Anderson Iron Co..... 281

In an action by the judgment creditor of a corporation to enforce the constitutional or statutory liability of its stockholders, the judgment, although by default, is conclusive against them on the question of the corporate indebtedness.
—Holland v. Duluth Iron Mining & D. Co..... 324

The name of a person appearing in the stock book of a corporation as that of a stockholder is prima facie evidence that he is the owner of stock.
—Holland v. Duluth Iron Mining & D. Co..... 324

To make such entries admissible in evidence, it is not necessary that the stock book should have been kept in any particular manner or that it contain the entries prescribed by statute.
—Holland v. Duluth Iron Mining & D. Co..... 324

The entry of defendant's name in the stock book as a stockholder, supplemented by identifying testimony, in the absence of rebutting testimony, supported a finding that he was a stockholder.
—Holland v. Duluth Iron Mining & D. Co..... 324

To constitute one a stockholder it is not necessary that a certificate of stock be issued.
—Holland v. Duluth Iron Mining & D. Co..... 324

The evidence supported a finding that defendants were stockholders, though certificates had not been issued and formal action had not been taken whereby they became stockholders.
—Holland v. Duluth Iron Mining & D. Co..... 324

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CORPORATION—Continued,

A corporation organized, not only for the purposes of mining, but also for the business of "buying and selling and dealing in mineral lands," is not organized for manufacturing or mechanical business within Const. art. 10, § 3.

—Holland v. Duluth Iron Mining & D. Co..... 324

Where defendant subscribed on certain conditions for preferred stock in a corporation to be organized, the unreasonable delay on the part of the corporation to organize in the manner agreed on and to comply with the conditions released defendant from his subscription and was a defense in an action by the corporation to enforce payment.

—Carter, Rittenberg & Hainlin Co. v. Hazzard..... 432

See "Estoppel," 508; "Evidence," 249; "Insurance (Credit)," 283; "Master and Servant," 256.

COSTS.

Where on a claim that the conclusions of law were not sustained by the findings of fact appellant caused a case to be settled containing all the evidence, and appealed from an order denying his motion for a new trial, upon a reversal of such order by the supreme court he was not entitled to disbursements for preparing, certifying and printing such evidence.

—Winston v. Hart..... 439

See "Mortgage," 133.

COUNTERCLAIM. See "Sale," 449.

COUNTIES AND COUNTY OFFICERS.

The repeal of Sp. Laws 1889, c. 412, by Laws 1895, c. 282, did not create a vacancy in the office of county commissioner of Aitkin county, but the persons previously elected under Sp. Laws 1889, c. 412, were entitled under G. S. 1894, § 657, to continue in office till their successors were elected and qualified.

—State v. Marr..... 243

A full board of five commissioners for said county should be elected at the next general election, under G. S. 1894, § 661.

—State v. Marr..... 243

G. S. 1894, § 831, does not authorize a county surveyor, whenever a county lets a contract for public improvements the plans of which, in his opinion, necessitate the service of a surveyor or civil engineer, to do the work at the expense of the county without request; nor can such request be implied from the mere fact that the county adopts plans and lets the contract.

—Haynes v. Board of County Commissioners..... 384

See "Constitution," 310; "Res Judicata," 406.

COURT. See "Evidence," 337; "Malicious Prosecution," 256.

COURTS (DISTRICT). See "Estate of Decedent," 162; "Taxes," 525.

COURTS (PROBATE).

An attempted amendment by the probate court of the files and records relating to a guardian's sale, 23 years after confirmation and deed, so as to exclude part of the land described, was without jurisdiction, and void.

—Kurtz v. St. Paul & Duluth Railroad Co..... 60

See "Appeal," 335; "Estate of Decedent," 162.

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COVENANT.

A covenant against incumbrances which are a money charge on the land, although contained in a mortgage, runs with the land; and an action may be maintained for its breach by an assignee of the mortgage who has acquired title to the land by purchase at a foreclosure sale and who has paid the incumbrances.

—Security Bank v. Holmes..... 531

See "Conveyance," 115, 457.

CREDIT INSURANCE. See "Insurance (Credit)," 283.

CRIMINAL LAW.

Under G. S. 1894, § 6702, making it forgery to utter as true a forged instrument, an indictment charging defendant with fraudulently and feloniously uttering and disposing of a forged check, then knowing the same to be forged, but omitting the words "as true," is insufficient.

—State v. Cody..... 121

Under an indictment for embezzlement in the general form authorized by G. S. 1894, § 7262, the state may prove all acts of embezzlement by defendant in the same employment committed within six months after the time alleged, and he may be convicted of the whole; but evidence of acts prior to such time is inadmissible as evidence of the substantive offence, and is admissible, if at all, only for a collateral purpose.

—State v. Holmes..... 230

If the state elects to waive the benefits of G. S. 1894, § 7262, and to frame a sufficient indictment and limit itself to evidence which is admissible, irrespective of this section, the six months limitation does not apply, and the indictment can be sustained by evidence of acts committed prior to the time alleged.

—State v. Holmes..... 230

An allusion by the county attorney to the failure of defendant to testify, which is prohibited by G. S. 1894, § 5658, is error.

—State v. Holmes..... 230

It is error to charge that evidence of defendant's good character is only to be considered when the other evidence leaves a doubt as to his guilt.

—State v. Holmes..... 230

See "Contempt," 146.

CROPS. See "Sale," 273.

CROSS-EXAMINATION. See "Evidence," 473; "Witness," 372.

CUSTOM. See "Charge of Court," 442.

DAMAGES.

In an action for personal injuries, the damages were not so excessive as to justify the conclusion that they were the result of passion or prejudice.

—Rogers v. Chicago Great Western Ry. Co..... 308

In an action for personal injuries, a verdict for $4000 was not excessive.

—Barg v. Bousfield..... 355

See "Appeal," 540; "Evidence," 473; "Grain Elevator," 515; "Sale," 148; "Slander and Libel," 18; "Verdict," 18.

DANGEROUS PREMISES. See "Negligence," 483.

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DEED. See "Conveyance."

DEMURRER. See "Corporation," 90; "Pleading," 90.

DESCRIPTION. See "Mechanic's Lien," 271.

DISMISSAL. See "Appeal," 540.

DISTRICT COURT. See "Courts (District)."

DULUTH (CITY OF). See "Election," 292; "Municipal Corporation," 292.

DYNAMITE. See "Negligence," 483.

EASEMENT. See "Possession," 500.

ELECTION.

In an action to enjoin the officers of the city of Duluth from issuing "water and light" bonds pursuant to a special election under the charter, *held* that the ballot was not so complex and misleading that the election was void.

—Janeway v. City of Duluth..... 292

Placing "Yes" and "No" after the proposition to be voted on was legal.

—Janeway v. City of Duluth..... 292

Certain irregularities were not sufficient to avoid the election, it not appearing that they changed the result.

—Janeway v. City of Duluth..... 292

The complaint did not state facts sufficient to constitute a cause of action.

—Janeway v. City of Duluth..... 292

See "Counties and County Officers," 243; "Municipal Corporation," 292.

EMBEZZLEMENT. See "Criminal Law," 230.

EMINENT DOMAIN. See "Grain Elevator," 515; "Practice," 295.

ENGINEER. See "Boiler Inspectors' Act," 453.

ENTRIES IN STOCK BOOK. See "Corporation," 324.

EQUITY.

In an action for specific performance, the complaint alleged that plaintiff held a contract for purchase of land, but had refused a tender from the vendor because the title was incumbered with the liens of judgments against a former owner; that thereafter the vendor sold the land to defendant, who purchased with notice of plaintiff's rights; and that afterwards the title improved by reason of satisfaction of some of the judgments and the better financial condition of the judgment debtor. *Held* that, as against defendant, the changed conditions furnished no excuse for plaintiff's delay and change of front in respect to his contract, and hence that allegations to show that the title was unmarketable by reason of other liens and that it was justified on that account in refusing the tender were properly stricken from the complaint as irrelevant and redundant.

—Oliver Mining Co. v. Clark..... 277

Equity will not relieve a party from a mistake of law, when the opposite party is blameless and the parties cannot be placed in their former position.

—Truesdale v. Sidle..... 315

See "Estate of Decedent," 124; "Mortgage," 315; "Trust," 71.

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ESTATE. See "Conveyance," 457.

ESTATE OF DECEDENT.

Where, upon the failure of the life tenant in a homestead estate to pay taxes and make repairs, in order to save the estate for the reversioners, the administrator with the will annexed, who was empowered so to do by the will, paid the taxes, the administrator was entitled to have a receiver appointed to collect the rents and apply the proceeds in payment of taxes and repairs and of its disbursements, and, in case the rents were insufficient, to have the life estate sold for such purpose.

—St. Paul Trust Co. v. Mintzer..... 124

Where, on appeal from the allowance by the probate court of a claim against the estate of a decedent founded in tort, defendant answered the complaint and went to trial without objection, the district court obtained jurisdiction of the parties and subject matter.

—First National Bank v. Strait..... 162

See "Corporation," 90; "Mortgage," 107, 246, 315; "Will," 361.

ESTOPPEL.

Where plaintiff held a note, which with others was secured by mortgage executed by a corporation to one who was not described as trustee, and failed to assert his lien in proceedings under G. S. 1894, c. 76, for appointment of a receiver and sequestration of the assets of the corporation, of which he had knowledge, though the mortgagee, who intervened, omitted to include plaintiff's note in his claim, *held* that plaintiff was estopped to assert his lien against bona fide purchasers from one who purchased the mortgaged premises at the receiver's sale, in such proceedings.

—Brown v. Union Depot S. Ry. & T. Co..... 508

See "Adverse Claims to Real Estate," 466; "Corporation," 40; "Infant," 191; "Res Judicata," 406.

EVICTION. See "Conveyance," 115.

EVIDENCE.

Upon the evidence as to what effort defendant had made to find a release said to have been executed and delivered by plaintiff to defendant and to have been lost, the court erred in admitting oral evidence of its contents.

—Slocum v. Bracy..... 100

Evidence that on the signing of articles of association and during negotiations resulting in their execution it was verbally agreed among those who signed and became stockholders that they should not be individually liable for corporate debts was inadmissible, because varying the terms implied by law.

—Oswald v. Minneapolis Times Co..... 249

In an action growing out of the collapse of a wall, the opinions of experts were admissible as to its sufficiency.

—Sneda v. Libera..... 337

The question whether a witness offered as an expert is qualified is for the court and is largely within its discretion.

—Sneda v. Libera..... 337

The evidence was sufficient to establish the execution, loss and contents of a written instrument.

—Windom v. Brown..... 394

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EVIDENCE—Continued,

In an action against a judgment creditor for conversion of property levied on as property of the judgment debtor, but claimed by plaintiff, it was error to refuse to allow defendant to cross-examine the judgment debtor on matters tending to throw light on an alleged fraudulent transaction between him and plaintiff, though such matters were not touched on in the direct examination.

—Cohen v. Goldberg..... 473

In such action, it was error to admit evidence of the wealth of defendant, where there was no evidence that he was guilty of oppression or wanton disregard of plaintiff's rights so as to justify punitive damages.

—Cohen v. Goldberg..... 473

In an action on a guaranty for rent, where the defense was that plaintiff lessor knew that the premises were to be used as a house of ill fame and were so used with his consent, evidence of the reputation of the place as a house of ill fame while occupied by the lessee before the lease, as well as afterwards, was competent.

—Egan v. Gordon..... 505

In such action evidence of acts done on the premises, in plaintiff's absence, showing that the place was a house of ill fame was competent.

—Egan v. Gordon..... 505

In an action on a life insurance policy, declarations of the insured of intention to commit suicide, made two years before his death, were too remote to be admissible on the issue whether he committed suicide.

—Hale v. Life Indemnity & Investment Co..... 548

In such action, the exclusion of evidence of declarations of the insured as to his health, made before his application, if erroneous, was cured by afterwards allowing defendant to introduce such evidence.

—Hale v. Life Indemnity & Investment Co..... 548

In such action, the admission, in rebuttal, of statements of the insured as to his intemperate habits was within the discretion of the court, and it did not err in excluding them.

—Hale v. Life Indemnity & Investment Co..... 548

See "Contempt," 146; "Contract," 170; "Corporation," 324; "Costs," 439; "Criminal Law," 230; "Fraud," 505; "Insurance (Fire)," 462; "Judgment," 60; "Jury," 80; "Logs," 372; "Master and Servant," 308, 337, 355; "Mortgage," 537; "Negotiable Instrument," 154, 304; "New Trial," 25; "Partnership," 162; "Pleading," 240; "Practice," 447; "Railway," 350; "Trust," 71.

EXCEPTION. See "Appeal," 80; "Charge of Court," 442.

EXECUTION.

Where after the docketing of judgment against a debtor in whose name the title to land stood of record, he executed a conveyance thereof in which he "fraudulently" recited that he held the title in trust for the grantee, who had always been the beneficial owner, this recital was not an apparent obstruction to the enforcement of the judgment lien for the removal of which the judgment creditor could maintain an action.

—Cornman v. Sidle..... 84

See "Insolvency," 156; "Insurance (Life)," 187.

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EXECUTOR AND ADMINISTRATOR. See "Estate of Decedent," 124; "Mortgage," 315.

EXEMPTION. See "Homestead," 491; "Insurance (Life)," 187.

EXPERT. See "Evidence," 337.

EXPRESS COMPANY. See "Carrier," 540.

FALSE IMPRISONMENT.

A complaint which alleges that, at a time and place stated, defendant imprisoned plaintiff, without probable cause, states a cause of action.

—Nixon v. Reeves..... 159

See "Master and Servant," 256; "Militia," 159.

FALSE REPRESENTATION. See "Infant," 191.

FEES. See "Coroner," 262; "Mortgage," 133, 315.

FINDINGS OF COURT. See "Adverse Claims to Real Estate," 466; "Appeal," 135, 495; "Conveyance," 115; "Pleading," 489.

FIRE. See "Railway," 112.

FORECLOSURE. See "Constitution," 471; "Covenant," 531; "Mortgage," 133, 246, 315, 471, 537; "Pledge," 439.

FORGERY. See "Criminal Law," 121.

FRAUD.

In an action on a guaranty of rent, allegations in the answer that defendant was induced by deceit to sign the guaranty on the lease, in the belief that he was signing as witness, constituted a defense.

—Egan v. Gordon..... 505

In such action, it was competent, or at most error without prejudice, to permit defendant to prove that he had no interest in the lease or in the business carried on upon the leased premises.

—Egan v. Gordon..... 505

See "Appeal," 495; "Corporation," 28, 249; "Evidence," 473; "Execution," 84; "Mortgage," 489; "Statute of Frauds," 104.

GARNISHMENT. See "Assignment," 497.

GOOD CHARACTER. See "Criminal Law," 230.

GRAIN ELEVATOR.

Laws 1893, c. 64 (G. S. 1894, §§ 7724–7729), "An act providing for the erection of public grain warehouses and grain elevators on or near the right of way of railways, and providing for condemnation proceedings in connection therewith," is not unconstitutional, as authorizing condemnation of property for private use, or as class legislation denying to railway companies the equal protection of the laws.

—Stewart v. Great Northern Railway Co..... 515

Laws 1893, c. 64, authorizes one who has under license from a railway company erected and is operating a public elevator on the site sought to be condemned to acquire the right to continue to maintain such elevator, though the license has been revoked and is about to expire.

—Stewart v. Great Northern Railway Co..... 515

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GRAIN ELEVATOR—Continued,
There was competent evidence for the jury on the question of damages for taking an easement under Laws 1893, c. 64.
—Stewart v. Great Northern Railway Co..... 515

GUARANTY. See "Evidence," 505; "Fraud," 505.

GUARDIAN AND WARD. See "Appeal," 335; "Courts (Probate)," 60.

HIGHWAY.
A statutory town is not liable to a traveler for injuries caused by its failure to repair its highway or by direct acts of negligence of its officers in repairing.
—Weltsch v. Town of Stark..... 5

HOMESTEAD.
Where defendant entered on certain "outlots" as homestead, and subsequently the plat was vacated as to such lots, and afterwards part of the land was by act of legislature included in the limits of a city, but the tract was always used by defendant for agricultural purposes and was not (nor was the surrounding land, though partly platted) urban in character, the whole tract was exempt as homestead.
—Kiewert v. Anderson..... 491
See "Estate of Decedent" 124.

HOUSE OF GOOD SHEPHERD. See "Municipal Corporation," 176.

HOUSE OF ILL FAME. See "Evidence," 505.

HUSBAND AND WIFE. See "Mortgage," 107.

ILLEGALITY.
Where the illegality of a contract is relied on as a defense and does not appear in the complaint, it must be pleaded in the answer.
—Woodbridge v. Sellwood..... 135
A party relying on a statute prohibiting Sunday contracts must prove facts which render the prohibition applicable.
—Woodbridge v. Sellwood..... 135

INCUMBRANCE. See "Covenant," 531.

INDICTMENT. See "Criminal Law," 121, 230.

INDORSEMENT. See "Negotiable Instrument," 110, 154, 304.

INFANT.
A minor is not estopped to set up infancy as a defense to a mortgage by the fact that at the time of its execution he represented that he was of age.
—Alt v. Graff..... 191
On the evidence the court was justified in declaring the mortgage void.
—Alt v. Graff..... 191
See "Master and Servant," 355; "Negligence," 355.

INJUNCTION. See "Corporation," 1; "Municipal Corporation," 176.

INJURY TO REAL ESTATE. See "Jurisdiction," 48.

INQUEST. See "Coroner," 262.

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INSOLVENCY.

The lien on the property of a judgment debtor acquired by commencement of proceedings supplementary to execution was dissolved by his execution of an assignment for benefit of creditors, under the insolvent law of 1881, within ten days thereafter, though the complaint of the judgment creditor was on file more than 20 days before entry of judgment.

—Wolf v. McKinley..... 156

A deed of assignment by partners for benefit of creditors must on its face be sufficient to assign, not only the partnership property, but also the non-exempt separate property of each partner.

—Farwell, Ozmun, Kirk & Co. v. Brooks..... 184
Holmes v. Same..... 187

An assignment executed as follows: "Brooks & Co., by W. M. Brooks. Al. Brooks," did not pass the separate property of W. M. Brooks.

—Farwell, Ozmun, Kirk & Co. v. Brooks..... 184
Holmes v. Same..... 187

An order granting or refusing a creditor leave to file his claim in insolvency proceedings after the time limited will not be set aside on appeal, unless there was a clear abuse of discretion.

—Richter v. Merchants National Bank..... 237

It was not an abuse of discretion to permit a creditor in insolvency proceedings to file his claim 14 months after the time limited, where the claim was bona fide, and no creditor was prejudiced except by the increase of liabilities, and settlement of the estate was not delayed, and the creditor had no notice of the order limiting time.

—Richter v. Merchants National Bank..... 237

A chattel mortgage executed by an insolvent to secure past indebtedness and also a present loan, though void as a preference so far as it secured past indebtedness, was a valid security for the loan.

—Joseph Schlitz Brewing Co. v. Childs..... 409

In such case the mortgagee was entitled to maintain an action against the assignee in insolvency of the mortgagor to recover possession of the mortgaged property.

—Joseph Schlitz Brewing Co. v. Childs..... 409

See "Appeal," 237; "Corporation," 90, 139, 249; "Estoppel," 508; "Insurance (Credit)," 283; "Landlord and Tenant," 413; "Principal and Surety," 426.

INSTRUCTIONS. See "Charge of Court."

INSURANCE COMMISSIONER. See "Insurance (Credit)," 283.

INSURANCE (CREDIT).

An assignment for creditors by a credit insurance company terminates the policy.

—Smith v. National Credit Ins. Co..... 283

How a policy should be adjusted when before it expires the insurer makes an assignment for creditors.

—Smith v. National Credit Ins. Co..... 283

In such case the insurer may recover the unearned premium.

—Smith v. National Credit Ins. Co..... 283

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INSURANCE (CREDIT)—Continued,

In such case, a policy holder having a claim for an unearned premium may participate in the funds deposited with the insurance commissioner under G. S. 1894, § 3332.

—Smith v. National Credit Ins. Co..... 283

In such case, where a policy holder did not suffer a sufficient loss before the assignment to recover under the policy, but did suffer a sufficient loss during the term covered by the policy, he was not entitled to recover out of the funds in the hands of the commissioner for losses subsequent to the assignment.

—Smith v. National Credit Ins. Co..... 283

In such case, a policy holder who had suffered no loss before the assignment was not entitled to rescind and recover the premium, but was entitled to recover only the unearned premium.

—Smith v. National Credit Ins. Co..... 283

Where the policy expired nine days before the assignment, the insured was entitled to recover on a quantum meruit without furnishing proof of loss within 30 days as provided by the policy.

—Smith v. National Credit Ins. Co..... 283

INSURANCE (EMPLOYERS' LIABILITY). See "Master and Servant," 355.

INSURANCE (FIRE).

Where the insured held policies issued by various insurers, and, after loss, the adjusters of two of the insurers, with the consent of the insured, sold the salvage, in actions on the policies against the other insurers the evidence justified the jury in finding that defendants' adjuster ratified the sale.

—First National Bank v. Lancashire Ins. Co..... 462

Under the terms of such policies, the adjuster had authority to sell and hence to ratify such sale.

—First National Bank v. Lancashire Ins. Co..... 462

In such case, failure of defendant insurers to cause the proceeds of such sale to be returned to plaintiff, after discovery that the policies had been forfeited before the fire, waived the forfeiture.

—First National Bank v. Lancashire Ins. Co..... 462

INSURANCE (LIFE).

G. S. 1894, § 3312, exempting from execution money to be paid by co-operative or assessment life insurance associations, applies to money after it has been paid to the beneficiary.

—First National Bank v. How..... 187

The title of the act of which said section is a part does not include more than one subject, and is constitutional.

—First National Bank v. How..... 187

A creditor of the insured, to whom he assigned his policy, as her interest might appear, had an insurable interest in his life, and continued to hold the policy as security for the debt, although she surrendered the original note and took other notes of the insured.

—Hale v. Life Indemnity & Investment Co..... 548

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INSURANCE (LIFE)—Continued,

In an action on such policy, the evidence sustained a finding that the new notes were taken in lieu, and not in payment, of the original note and debt.

—Hale v. Life Indemnity & Investment Co..... 548

In such action, if entitled to recover, plaintiff was entitled to the full face value of the policy, though part of the debt was not due.

—Hale v. Life Indemnity & Investment Co..... 548

Where the court charged that the presumption was that the policy was valid until the contrary was made to appear, and added, "This is only one form of saying that the burden of proof rests upon the defendant, and not upon the plaintiff, to show that the policy is not a legal and binding contract, as it purports to be," the instruction, as a whole, was not erroneous.

—Hale v. Life Indemnity & Investment Co..... 548

Where the insured warranted the truth of his answers made in his application, he was bound to answer accurately so far as he undertook to answer, but his warranty did not extend beyond the answers as actually given.

—Hale v. Life Indemnity & Investment Co..... 548

See "Evidence," 548.

INTEREST. See "Contract," 300.

INTERVENTION. See "Corporation," 90; "Estoppel," 508; "Practice," 295.

JOINT AND SEVERAL DEBTORS. See "Pleading," 429.

JOINT DEBTORS. See "Judgment," 402; "Pleading," 429.

JUDGMENT.

A judgment inter alios is not evidence against a third party of the facts on which it was based.

—Kurtz v. St. Paul & Duluth Railroad Co..... 60

If a judgment entered in accordance with an order therefor departs from or exceeds the relief demanded, the remedy is by appeal, and not by motion to set aside.

—Palmer v. Bank of Zumbrota..... 90

In an action against joint debtors, if plaintiff enters judgment by default against one alone, the debt merges in the judgment, which constitutes a bar to recovery against the others.

—Davison v. Harmon..... 402

See "Adverse Claims to Real Estate," 466; "Appeal," 25, 60, 345; "Conveyance," 115; "Corporation," 1, 90, 139, 249, 324; "Execution," 84; "Plat," 491; "Pleading," 429; "Res Judicata," 406.

JUDGMENT NON OBSTANTE VEREDICTO. See "Practice," 447.

JURISDICTION.

Action lies in this state to recover damages for injuries to land situate in another state.

—Little v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co..... 48

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JURISDICTION—Continued,

G. S. 1894, §§ 5182, 5183, only apply to causes of action arising within the state.

—Little v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co..... 48

See "Estate of Decedent," 162; "Courts (Probate)," 60; "Taxes," 525.

JURY.

It is prejudicial error to submit a case to the jury on a point on which there is no evidence.

—Van Doren v. Wright..... 80

See "Appeal," 80; "Charge of Court," 382; "Constitution," 196; "Malicious Prosecution," 256; "Master and Servant," 337, 355; "Negligence," 355, 483; "Partnership," 9.

LACHES. See "Corporation," 40; "New Trial," 60.

LAND GRANT. See "Public Land," 367.

LANDLORD AND TENANT.

Where a lessee, who was occupying an hotel under a lease, though by its terms he was not bound to occupy it, by reason of depression in the hotel business became insolvent and notified the lessor that he should vacate and pay no more rent, and the parties made an agreement, whereby the rent was reduced and the lessor was to make repairs, and thereafter the lessee continued to occupy the premises, paying the reduced rent, the agreement to accept reduced rent was upon sufficient consideration.

—Ten Eyck v. Sleeper..... 413

See "Conveyance," 457; "Evidence," 505; "Fraud," 505; "Pleading," 240.

LEASE. See "Conveyance," 457; "Evidence," 505; "Fraud," 505; "Pleading," 240.

LIBEL. See "Slander and Libel," 87.

LICENSE. See "Negligence," 483.

LIEN. See "Adverse Claims to Real Estate," 466; "Appeal," 25; "Conveyance," 457; "Estoppel," 506; "Equity," 277; "Execution," 84; "Insolvency," 156; "Mechanic's Lien," 271; "Mortgage," 246.

LIFE ESTATE. See "Conveyance," 457; "Estate of Decedent," 124.

LOCAL ASSESSMENT. See "Assessment for Local Improvement," 229; "Municipal Corporation," 298.

LOGS.

Where the correctness of tally cards, which were the basis of scale bills received in evidence, was in issue, subsequent acts of misconduct on part of the tallyman *held* inadmissible to impeach his integrity and the correctness of the cards, without laying a foundation by proof sufficient in the opinion of the court to establish that he was acting for or in collusion with plaintiff.

—Matthews v. Hershey Lumber Co..... 372

See "Conveyance," 543; "Possession," 500.

LOST INSTRUMENT. See "Evidence," 100, 394.

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MALICIOUS PROSECUTION.

In an action for malicious prosecution, what facts constitute probable cause is for the court; but what facts exist, when they are disputed, is for the jury.

—Smith v. Munch..... 256

MANDAMUS. See "Res Judicata," 406.

MANUFACTURING CORPORATION. See "Corporation," 324.

MARRIED WOMAN. See "Mortgage," 107.

MASTER AND SERVANT.

Where the superintendent of defendant manufacturing corporation caused the arrest of plaintiff without warrant, on a charge of disorderly conduct committed several hours before in unlawfully entering the factory and attempting by threats to induce the employés to quit work, defendant was liable for the unlawful arrest.

—Smith v. Munch..... 256

The fact that the superintendent exceeded his authority or disobeyed instructions did not excuse defendant.

—Smith v. Munch..... 256

In an action by an engineer for personal injuries from negligence of defendant railway company in failing to repair its locomotive, the evidence sustained the verdict in favor of plaintiff.

—Rogers v. Chicago Great Western Ry. Co..... 308

Under the contract for employment of defendant as manager, salesman and collector, although there was to be a provisional determination of his share of the profits as compensation each month, this was provisional and subject to revision when his employment ceased.

—Morrison v. Arons..... 321

Where such employé gave bond conditioned on faithful performance and repayment of all moneys withdrawn in excess of his share of the profits, the contract of suretyship was altered by failure to have such monthly determination of his share, and the sureties were released.

—Morrison v. Arons..... 321

In an action by an employé for personal injuries, based on the alleged negligence of defendant employers, the questions of defendants' negligence, of plaintiff's assumption of risk, and of contributory negligence, were for the jury.

—Sneda v. Libera..... 337

In an action to recover for personal injuries, the question whether defendant employer was negligent in failing to warn plaintiff, who was a boy between 15 and 16 years of age, of the dangerous character of the machinery which caused the injuries was for the jury.

—Barg v. Bousfield..... 355

In such action, the evidence justified the jury in finding that one by whom plaintiff was directly employed was not an independent contractor, but was the agent of defendants so that they were responsible for his negligence.

—Barg v. Bousfield..... 355

In such action, as tending to show that defendants did not regard such person as an independent contractor, evidence was admissible which

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MASTER AND SERVANT—Continued,

showed that defendants held a policy indemnifying them "to a certain extent" from liability for injury to employés working in their factory and that the insurer was defending the action; nothing further as to the terms of the policy appearing, and it not appearing that the insurer undertook to defend in all cases in which defendants might be charged with such liability.

—Barg v. Bousfield..... 355

In such action, it was not error to refuse to charge that if the saw, which caused the injury, was partly covered, plaintiff could not recover.

—Barg v. Bousfield..... 355

Where defendant street railway company by its rules required employés in charge of cars to give warning of their approach by signals to employés engaged in track repairing, and plaintiff employé, while so engaged and in reliance on such rules, was struck and injured by a car, owing to failure of the motorman to give such signals and to the fact that the car was running at a rate prohibited by law, plaintiff and the motorman were fellow servants, and defendant was not liable.

—Lundquist v. Duluth Street Railway Co..... 387

See "Accord and Satisfaction," 13; "Charge of Court," 382; "Railway," 69, 350.

MECHANICAL CORPORATION. See "Corporation," 263, 281, 324.

MECHANIC'S LIEN.

Where the premises as described in the lien statement were the east half of lot 7 and the west half of lot 6, whereas the house in respect to which the lien accrued was on the west half of lot 7 and the east half of lot 6, the description was sufficient under G. S. 1894, § 6237.

—Evans v. Sanford..... 271

In such case, where after rejecting the erroneous part of the description as surplusage the remaining description covered a tract exceeding the statutory limit, but all was owned by the lien debtor, the court could carve out a tract within the limit and adjudge the lien to be thereon.

—Evans v. Sanford..... 271

See "Appeal," 25.

MERGER. See "Judgment," 402.

MILITIA.

A captain in the national guard of the state is not authorized, for refusal to obey orders, summarily to punish by imprisonment a member of his company, when it is not acting as a military force.

—Nixon v. Reeves..... 159

MINING. See "Corporation," 263, 281; "Negligence," 483.

MINNEAPOLIS (CITY OF). See "Municipal Corporation," 298.

MINOR. See "Infant"; "Master and Servant," 355; "Negligence," 355.

MISTAKE. See "Equity," 315.

MOORHEAD (CITY OF). See "Municipal Corporation," 419.

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MORTGAGE.

Where a judgment creditor's demand is secured by mortgage, a receiver of the debtor's property may be appointed in supplemental proceedings, though the creditor has not exhausted his security.

—Bean v. Heron..... 64

The appointment of a receiver rests in the discretion of the court.

—Bean v. Heron..... 64

Such appointment is not an abuse of discretion if the security is inadequate.

—Bean v. Heron..... 64

Where a married woman, without consideration to herself, joined with her husband in a mortgage of his land whereby they covenanted to pay the mortgage debt, which was evidenced by his note, she occupied the position of surety.

—Siebert v. Quesnel..... 107

In such case, where the husband died leaving estate sufficient to pay all claims, and the assignees of the mortgage failed to present their claim in the probate court for allowance within the time fixed, she was released from personal liability.

—Siebert v. Quesnel..... 107

The purchaser of a mortgage takes it subject to the equities between the original parties.

—Watkins v. Goessler..... 118

G. S. 1894, § 6051, requiring the party foreclosing a mortgage to file within ten days an affidavit of costs, is mandatory.

—Brown v. Baker..... 133

The one year limitation under G. S. 1894, § 6052, does not apply to an action by the mortgagor to recover costs, disbursements, and attorney's fees, where an affidavit of costs is not filed.

—Brown v. Baker..... 133

A general creditor of a deceased person, though his claim has been allowed against the estate, has no lien on the real estate which entitles him to redeem from the foreclosure of a mortgage thereon executed by the deceased.

—Nelson v. Rogers..... 246

Where a mortgagee and the executors of his comortgagee foreclosed and bid in the premises for an amount which included unauthorized attorney's fees, which they believed to be authorized, and the mortgagor brought action against them for such fees as part of the surplus, the premises having depreciated in value since the sale, defendants were not entitled to have the sale set aside and a new sale ordered, or to defeat the action by tendering a deed on being paid the amount due on the mortgage.

—Truesdale v. Sidle..... 315

In such case the claim that the surplus belonged to a second mortgagee could not be considered, when the claim was not made by the answer and he had made no claim thereto.

—Truesdale v. Sidle..... 315

In such case defendants had no right to set off against such surplus taxes paid by them after the foreclosure.

—Truesdale v. Sidle..... 315

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MORTGAGE—Continued,

The mortgagor's right to recover the surplus of the proceeds of a foreclosure sale, which is actually due from the mortgagee and which he has misappropriated, is assignable without transfer of the equity of redemption.

—Lynott v. Dickerman..... 471

In such case, whether the naked right to recover the penalty provided for by G. S. 1894, § 6052, is assignable, quære.

—Lynott v. Dickerman..... 471

Payment of principal and accrued interest by the mortgagor to the mortgagee, without notice that it has been assigned, extinguishes the mortgage, although the debt is not mature and the note and mortgage are not produced.

—Olson v. Northwestern Guaranty Loan Co..... 475

In an action upon the assumption clause in a deed whereby defendant as grantee assumed and agreed to pay a mortgage, the evidence sustained a finding that the grantor fraudulently caused the assumption clause to be inserted, and defendant was entitled to judgment.

—Martini v. Christensen..... 489

Where the assignee of a mortgage foreclosed by advertisement and bid in the premises for a sum intended to include the amount of taxes, which she did not in fact pay till after the sale, she was not entitled to retain from the proceeds of sale the amount so paid, but was liable therefor to the owner of the premises in an action to recover an alleged surplus of such proceeds.

—Wyatt v. Quinby..... 537

Where the attorney foreclosing such mortgage included in his affidavit of costs and disbursements a statement of the amount of taxes paid, such affidavit was not admissible in evidence to establish the fact and time of such payment.

—Wyatt v. Quinby..... 537

See "Adverse Claims to Real Estate," 466; "Constitution," 471; "Covenant," 531; "Estoppel," 508; "Infant," 191; "Pledge," 439; "Statute of Limitations," 391.

MOTION. See "Practice," 447.

MUNICIPAL CORPORATION.

An ordinance of the city of St. Paul establishing the House of the Good Shepherd as a workhouse for female prisoners was void, and contracts by the city with the corporation owning such house for detention and board of prisoners was illegal, and the city might be enjoined from entering into such contracts, at suit of a resident taxpayer.

—Farmer v. City of St. Paul..... 176

Plaintiff was not entitled to an injunction restraining said city from paying such institution for past services, or to an accounting for moneys paid in the past for such services.

—Farmer v. City of St. Paul..... 176

Where said city threatened and intended to continue to commit prisoners to such institution and to contract and pay for their detention, plaintiff was entitled to an injunction restraining the city therefrom.

—Farmer v. City of St. Paul..... 176

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MUNICIPAL CORPORATION—Continued,

In an action to enjoin the officers of the city of Duluth from issuing "water and light" bonds pursuant to a special election under the charter, *held* that the city might issue such bonds to erect a water plant alone.

—Janeway v. City of Duluth..... 292

The question of the necessity of erecting such a water plant, when the city was adequately supplied by another plant owned by a private corporation, was legislative, and not for the courts.

—Janeway v. City of Duluth..... 292

The provisions of Laws 1895, c. 236, "An act to authorize the extending of the time of payment of assessments for local improvements by cities," etc., are permissive, and not mandatory.

—State v. City Council..... 298

Under the charter of the city of St. Paul (Sp. Laws 1887, c. 7, subc. 7, tit. 1, § 47) providing for redemption within five years of land sold on judgment for special assessments and for notice of expiration of time of redemption, where the notice given was void, a new notice might be given after the five years.

—Flanagan v. City of St. Paul..... 347

Under Sp. Laws 1887, c. 7, subc. 7, tit. 1, § 50, as amended by Sp. Laws 1889, c. 32, the setting aside of the tax deed or certificate of sale in a prior action is a condition precedent to the right to maintain an action against such city to recover the amount paid at such sale.

—Flanagan v. City of St. Paul..... 347

Under the charter of the city of Moorhead (Sp. Laws 1881, c. 28) all ordinances, resolutions, and by-laws of the council of a legislative nature, must, before they take effect, be approved by the mayor (or be passed over his disapproval) and be published in the official paper.

—State v. Darrow..... 419

The subdivision of a ward of the city is a legislative act.

—State v. Darrow..... 419

A certain resolution of the council was sufficient to subdivide a ward as of the date of its passage, but had no retroactive effect, so as to validate a prior invalid attempt to subdivide it.

—State v. Darrow..... 419

See "Assessment for Local Improvement," 229; "Contract," 300; "Election," 292; "Highway," 5; "Practice," 295.

NATIONAL GUARD. See "Militia," 159.

NEGLIGENCE.

In an action to recover for personal injuries, the question whether plaintiff, a boy between 15 and 16 years of age, was guilty of contributory negligence in failing to exercise the discretion which one of his age and experience ought to exercise was for the jury.

—Barg v. Bousfield..... 355

Where contractors built a boarding camp on mining lands of defendant corporation and permitted plaintiffs to occupy it, but abandoned their contract with said defendant, which resumed possession and stored dynamite near the camp, and notified plaintiffs that if they remained it was at their

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NEGLIGENCE—Continued,

own risk, and within three weeks the dynamite exploded and injured plaintiffs' personal property, *held*, that plaintiffs were bare licensees, and that the question whether they had reasonable time to remove before the explosion was for the jury.

—Clarkin v. Biwabik-Bessemer Co..... 483

In such case, the corporation and the other defendants, who were its servants, would be liable in damages if the explosion was due to their want of ordinary care and skill, while plaintiffs were in actual possession as bare licensees.

—Clarkin v. Biwabik-Bessemer Co..... 483

See "Carrier," 319; "Charge of Court," 382; "Highway," 5; "Master and Servant," 308, 337, 355, 387; "Principal and Agent," 442; "Railway," 69, 350.

NEGOTIABLE INSTRUMENT.

Where plaintiffs purchased from the payees a negotiable note, in due course of business, before maturity and for value, they were not affected with notice of equities in favor of the makers, because the face of the note was stamped with the name of a bank, and over the indorsement by the payees their indorsement without recourse had been erased and partial payments by persons other than the makers had been indorsed.

—Collins v. McDowell..... 110

In a suit by a purchaser for value before maturity of a note indorsed without recourse, where defendant makers offered to prove that plaintiff purchased with knowledge that one of the makers was insolvent and also offered expert testimony to prove that it was not in usual course of business to purchase under such circumstances, *held* that such expert testimony was not competent.

—Merchants & Mechanics Savings Bank v. Cross..... 154

Where plaintiff made a prima facie case that it was an innocent purchaser for value before maturity of a note, evidence offered by defendant makers to prove a defense against the payee was properly excluded, where they did not offer to rebut plaintiff's prima facie case.

—Merchants & Mechanics Savings Bank v. Cross..... 154

In a suit by the purchaser of a note payable to the order of Reid Bros., whose name was indorsed, plaintiff's possession being prima facie evidence, under G. S. 1894, § 5751, that it was indorsed by the firm, an offer by defendant makers to prove that it was indorsed by A. Reid was immaterial, when they did not offer to prove that he had not authority to indorse.

—Merchants & Mechanics Savings Bank v. Cross..... 154

Possession of a note by the payee with his own indorsement in blank is prima facie evidence of his ownership.

—Ames & Frost Co. v. Smith..... 304

In an action on a note, where the complaint alleged that defendant made, executed and delivered the note, whereby he promised to pay a certain sum to a person named, it was unnecessary to allege that the note was delivered to such payee.

—Topping v. Clay..... 346

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NEGOTIABLE INSTRUMENT—Continued,

An allegation that the note was duly assigned and transferred to plaintiff and that he has ever since been the owner thereof sufficiently alleged transfer by the payee named.

—Topping v. Clay..... 346

See "Insurance (Life)," 548; "Mortgage," 475; "Pleading," 429; "Principal and Surety," 426; "Usury," 37.

NEW TRIAL.

The court properly exercised its discretion in denying a new trial for newly discovered evidence.

—Malmgren v. Phinney..... 25

On account of plaintiff's laches it was error to grant a new trial.

—Kurtz v. St. Paul & Duluth Railroad Co..... 60

Where there had been four verdicts in favor of plaintiff, three of which were set aside as not justified by the evidence, it was an abuse of discretion to set aside the fourth on that ground, when it was fairly justified by the evidence.

—Van Doren v. Wright..... 80

See "Appeal," 60, 382, 540; "Practice," 447.

NOTICE. See "Insolvency," 237; "Negotiable Instrument," 110; "Practice," 447.

NOTICE OF EXPIRATION OF TIME TO REDEEM. See "Municipal Corporation," 347.

OPTION. See "Pledge," 364.

ORDER. See "Appeal," 382; "Assignment," 497; "Practice," 447.

ORDINANCE. See "Municipal Corporation," 176, 419.

PARTIES TO ACTION. See "Corporation," 90; "Mortgage," 315; "Pleading," 429; "Practice," 295, 515.

PARTNERSHIP.

A contract, whereby the parties were to share in profits in proportion to the capital contributed and in case of loss assessments were to be made on all not to exceed in all the amount subscribed by each, constituted all partners.

—McKasy v. Huber..... 9

Under the pleadings and evidence defendant was entitled to have the question whether he executed a contract of partnership submitted to the jury.

—McKasy v. Huber..... 9

Evidence of acts and admissions of a partner after dissolution of the firm, not authorized or assented to by a co-partner, were inadmissible to prove a charge of fraud against him, in an action against his administrator.

—First National Bank v. Strait..... 162

See "Insolvency," 184; "Pleading," 9.

PAYMENT. See "Mortgage," 475; "Principal and Surety," 426.

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PAY ROLL. See "Accord and Satisfaction," 13.

PERSONAL INJURY. See "Carrier," 319; "Charge of Court," 382; "Damages," 308, 355; "Highway," 5; "Master and Servant," 308, 337, 355, 387; "Negligence," 355; "Railway," 69, 350.

PLAT.

Where the plat of certain "outlots" was by judgment of the district court vacated as to certain lots, although the proceedings were not recorded pursuant to G. S. 1894, § 2317, the judgment was not open to collateral attack.

—Klewert v. Anderson..... 491

See "Homestead," 491.

PLEADING.

A general denial in an answer puts in issue an allegation that defendants are partners.

—McKasy v. Huber..... 9

A hypothetical statement or admission may be made in an answer to enable defendant to plead all his defenses.

—McKasy v. Huber..... 9

A denial of "knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer" was sufficient against objection first made after verdict.

—Trustees of Macalester College v. Nesbitt..... 17

If a complaint states a cause of action against one of several defendants jointly demurring, it is not demurrable.

—Palmer v. Bank of Zumbrota..... 90

In an action to determine adverse claims, where the answer set up a lien under a mortgage from plaintiff, he was entitled in his reply to allege facts to show that the mortgage was void because he was a minor when he executed it, and was not obliged to allege such facts in the complaint.

—Alt v. Graff..... 191

In an action on a lease, under a denial of its execution, evidence that after execution the name of a second witness and a certificate of acknowledgment were added is inadmissible.

—Roberts v. Nelson..... 240

Where the complaint alleges a cause of action as upon a joint note, and judgment for want of answer is entered against one defendant, the court may in its discretion allow, as against another defendant, an amendment to the complaint whereby the cause of action is alleged as upon a joint and several note.

—Pfefferkorn v. Haywood..... 429

Where the issues on which a finding was made were voluntarily litigated, an amendment to make the answer conform to the facts as found was unnecessary.

—Martini v. Christensen..... 489

See "Charge of Court," 382; "Corporation," 90; "Equity," 277; "False Imprisonment," 159; "Fraud," 505; "Illegality," 135; "Mortgage," 315; "Negotiable Instrument," 346; "Partnership," 9.

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PLEDGE.

Where the pledgee of stock, without the pledgor's consent, put it out of his control, by cancelling the certificates and reissuing it to a third party as security for the completion of another contract, he was guilty of conversion.

—Upham v. Barbour..... 364

Where such pledgee had an option to buy the stock at a specified price, he might elect to consider the conversion an exercise of the option, and recover such price.

—Upham v. Barbour..... 364

Defendant wife, in consideration of the extension of and to secure the note of defendant husband to plaintiff, assigned to him policies of insurance, with the privilege of redeeming them by paying the surrender value. After maturity of the note, which was then again extended, defendants executed to plaintiff, as additional security therefor, a mortgage on the separate property of the wife. Plaintiff foreclosed the mortgage, and applied to payment of the note the proceeds of the foreclosure sale, which were in excess of the surrender value of the policies, and then recovered judgment for the balance due on the note. *Held*, that plaintiff could maintain an action for a sale of the policies and the application of the proceeds to payment of said judgment.

—Winston v. Hart..... 439

In such case, the foreclosure sale for more than the surrender value of the policies did not operate as an exercise of defendant's privilege of redeeming them, and did not entitle her to have them reassigned to her.

—Winston v. Hart..... 439

See "Insurance (Life)," 548.

POLICY OF INSURANCE. See "Evidence," 548; "Insurance (Credit)," 283; "Insurance (Fire)," 462; "Insurance (Life)," 548; "Pledge," 439.

POSSESSION.

Where defendant, for the purpose of sluicing logs, built a dam, whereby the water of the river was obstructed and overflowed plaintiff's land during April, May, and June in each year for 15 years, an easement by prescription was created therein during said months in each year.

—Swan v. Munch..... 500

See "Adverse Claims to Real Estate," 466; "Conveyance," 115.

PRACTICE.

In an action against a city to recover an award made as damages for taking land for a public use, one who claims, as owner of the land, or of a part of it, to be entitled to the award, may come in as a party and assert his claim.

—Smith v. City of St. Paul..... 295

On the hearing of a motion for a new trial, a party is not entitled to an order for judgment notwithstanding the verdict, unless the moving papers include a notice of motion for such judgment.

—Crane v. Knauf..... 447

Where a party appeals from an order for judgment notwithstanding the verdict, made upon a simple notice of motion for a new trial on the ground that the verdict was not justified by the evidence and was contrary to law,

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PRACTICE—Continued,
the order will first be modified, and the appeal will then be considered as from an order granting a new trial on the ground that the evidence did not justify the verdict.
—Crane v. Knauf..... 447
The objection of defect of parties defendant is waived unless taken advantage of by demurrer or answer.
—Stewart v. Great Northern Railway Co..... 515
See "Appeal," 25, 37, 60, 237, 345, 514; "Corporation," 90; "Costs," 439; "Evidence," 473; "Insolvency," 237; "Judgment," 90, 402; "Pleading," 17, 429, 489.

PREFERENCE. See "Insolvency," 409.

PREMIUM. See "Insurance (Credit)," 283.

PRESCRIPTION. See "Possession," 500.

PRINCIPAL AND AGENT.
Where a mere sales-agent purchased from a rival concern on his principal's account wares of the kind which he was employed to sell, the principal was not liable to the seller by reason of failure to exercise such diligence as would have led to the discovery that the agent was making such purchases in excess of his authority.
—Finance Co. v. Old Pittsburgh Coal Co..... 442
See "Broker," 150; "Insurance (Fire)," 462; "Master and Servant," 256, 355; "Sale," 449.

PRINCIPAL AND SURETY.
Petitioners were two of the five sureties upon a joint and several bond given under G. S. 1894, § 729, and were also indebted as principal and surety upon a note held by the principals on the bond. *Held*, that after the insolvency of the principals while holding county funds, the surety upon the note was not entitled to have the amount paid by him to the county in discharge of his proportionate liability upon the bond applied as payment upon the note pro tanto.
—Cosgrove v. McKasy..... 426
See "Master and Servant," 321; "Mortgage," 107.

PROBATE COURT. See "Courts (Probate)."

PROMISSORY NOTE. See "Negotiable Instrument," 110, 154, 304, 346; "Pleading," 429.

PUBLIC LAND.
Under Sp. Laws 1877, c. 201, relating to the extension of time for completion of St. Paul & Pacific Railroad Company's Extension Lines, as amended by Sp. Laws 1878, c. 71, to entitle a party to the benefit of section 10 of the original act, he must have settled on the land claimed on or before March 1, 1877.
—St. Paul, Minneapolis & Manitoba Ry. Co. v. Broulette..... 367

QUANTUM MERUIT. See "Insurance (Credit)," 283.

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RAILWAY.

Where plaintiff sectionman, employed in repairing the track of defendant railway company, was injured by a rail carried by himself and another sectionman, who negligently let it fall, plaintiff's employment involved an element of danger peculiar to the "railroad business," and G. S. 1894, § 2701, making railway companies liable to servants for negligence of fellow servants, applied.

—Blomquist v. Great Northern Railway Co..... 69

In an action for damages alleged to have resulted from fire set by defendant's locomotive, it was error to charge the jury that, if they found that the fire started soon after the locomotive passed and there was no other apparent cause, they might infer that it was set by the locomotive, but that they would not be bound so to infer, if there was reasonable ground to believe that it might have started in some other way.

—Flanaghan v. Chicago, Milwaukee & St. Paul Railway Co..... 112

Where a brakeman, while coupling an engine to a freight train, was injured by having his hand caught between the bumpers, and contended that the accident was caused by the sudden jerking of the engine, *held* that there was no evidence that the jerking was more than ordinarily occurs in switching and coupling cars, the risk of which he assumed, or to show that the engineer was negligent.

—Puffer v. Chicago Great Western Ry. Co..... 350

See "Boiler Inspectors' Act," 453; "Carrier," 168; "Grain Elevator," 515; "Master and Servant," 308; "Public Land," 367.

RATIFICATION. See "Corporation," 40; "Insurance (Fire)," 462; "Municipal Corporation," 419.

REARGUMENT. See "Appeal," 514.

REBUTTAL. See "Evidence," 548.

RECEIVER. See "Corporation," 1, 40, 90, 249; "Estate of Decedent," 124; "Estoppel," 506; "Mortgage," 64.

RECITAL. See "Execution," 84.

RECORD. See "Courts (Probate)," 60; "Execution," 84; "Plat," 491.

REDEMPTION. See "Mortgage," 246, 471; "Municipal Corporation," 347; "Pledge," 439; "Statute of Limitations," 391.

REPEAL. See "Counties and County Officers," 243.

REPLEVIN. See "Insolvency," 409.

REPUTATION. See "Evidence," 505.

RESCISSION. See "Insurance (Credit)," 283; "Sale," 170.

RES JUDICATA.

Respondent county auditor was not estopped by the judgment on a former application for mandamus from alleging that the school district of which relator was treasurer had been dissolved.

—State v. Cooley..... 406

See "Appeal," 25; "Adverse Claims to Real Estate," 466.

RESOLUTION. See "Municipal Corporation," 419.

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REVERSION. See "Conveyance," 457; "Estate of Decedent," 124.

REVIEW. See "Appeal," 345.

RIVER. See "Conveyance," 543; "Possession," 500.

ST. PAUL (CITY OF). See "Assessment for Local Improvement," 229; "Contract," 300; "Municipal Corporation," 176, 347.

SALE.

The buyer's acceptance of property in fulfillment of an executory contract of sale waives the objection that it was not delivered at the time agreed, unless he reserves the right to claim damages for the delay.

—Minneapolis Threshing Machine Co. v. Hutchins..... 89

Where the buyer agreed to pay for a cow and a steer at a certain price per pound and the seller was to feed them for two months and deliver them to the buyer at a distance, the title did not pass, and the seller's remedy for the buyer's refusal to accept was an action for damages for breach of the executory contract.

—Restad v. Engemoen..... 148

Where the buyer of a chattel gave his note for the price, and as security assigned a note secured by chattel mortgage, and intervened in an action by the seller to recover possession of the mortgaged property, and the issue was whether the sale had been rescinded, *held* error to submit to the jury the question whether the sale was accompanied by warranty.

—Lynch v. Curfman..... 170

Breach of warranty does not rescind or entitle the buyer to rescind a sale, but merely gives a right to recover damages.

—Lynch v. Curfman..... 170

Where the seller refuses to warrant the thing sold, which is open to inspection, his statements as to its quality, in the absence of fraud, are not warranties.

—Lynch v. Curfman..... 170

Where a crop was sold before the seed was sown, the contract of sale was executory, and the jury were not warranted in finding that the title passed before the crop was ready for delivery.

—Welter v. Hill..... 273

A contract for the sale of railroad ties construed as providing that payment should be made thirty days after they had been inspected and accepted, as complying with the contract, by a third party.

—Potter v. Holmes..... 377

In an action for the price of such ties, where the complaint failed to allege such inspection and acceptance, or facts which would relieve plaintiffs from making and proving such allegation, it did not state a cause of action.

—Potter v. Holmes..... 377

Where the buyers gave the seller's agent a written order for a machine, the order containing a warranty by the seller subject to conditions to be complied with by the buyers in case of its breach, and afterwards it was agreed to abandon the contract and that the seller should furnish another machine, which the seller through its agent orally warranted, such warranty was not subject to the conditions in the original order.

—Gaar, Scott & Co. v. Patterson..... 449

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SALE—Continued,

In such case, in an action by the seller on notes given for the price, the buyers were entitled to recover damages by way of counterclaim for breach of warranty.

—Gaar, Scott & Co. v. Patterson..... 449

To maintain such counterclaim it was not necessary for defendants to show that such machines were usually sold with warranty.

—Gaar, Scott & Co. v. Patterson..... 449

In such case, where the original order had not been accepted by the seller, and the machine was delivered under the new agreement, it was immaterial whether the agent had authority to rescind contracts.

—Gaar, Scott & Co. v. Patterson..... 449

Defendant in Duluth ordered from plaintiffs in New Orleans bananas to be shipped to St. Paul in care of a railway company, by which they were received and carried to Duluth, where they were found not to be as ordered. Defendant then telegraphed to plaintiffs "Car bananas here, subject to your order. Not a first class banana in the car," and plaintiffs telegraphed in answer "Take fruit. Will write," whereupon defendant disposed of the fruit. *Held*, that an acceptance or rejection at St. Paul was waived, and that defendant was liable only for the reasonable value.

—Cefalu v. Fitzsimmons-Derrig Co..... 480

See "Broker," 150; "Contract," 304; "Insurance (Fire)," 462; "Mortgage," 315, 537; "Pledge," 364, 439; "Principal and Agent," 442.

SCHOOL DISTRICT. See "Schools," 406; "Constitution," 406.

SCHOOLS.

Where an independent school district has been dissolved pursuant to statute, no presumption in favor of its continued existence arises under G. S. 1894, § 3648, from the fact that certain inhabitants of the former district have persisted in usurpation of corporate powers for one year after its dissolution.

—State v. Cooley..... 406

See "Constitution," 406.

SET-OFF. See "Mortgage," 315; "Principal and Surety," 426.

SETTLED CASE. See "Appeal," 135; "Costs," 439.

SHERIFF. See "Statute of Limitations," 391.

SIGNATURE. See "Insolvency," 184.

SLANDER AND LIBEL.

A telegram in the words "Slippery Sam, your name is pants," signed "Many Republicans," and addressed to plaintiff, was susceptible of a libelous meaning.

—Peterson v. Western Union Telegraph Co..... 18

Where defendant telegraph company received and forwarded such message over its wires to its operator, who wrote it down, and sent it in a sealed envelope to plaintiff, the evidence justified the jury in finding a malicious publication by defendant.

—Peterson v. Western Union Telegraph Co..... 18

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SLANDER AND LIBEL—Continued,

In such case a verdict for $5,200 damages was so excessive as to justify the conclusion that it was the result of passion and prejudice.

—Peterson v. Western Union Telegraph Co. 18

Written publications calculated to expose a person to public contempt and ridicule, and thereby induce an ill opinion of him, are libelous, though they involve no imputation of crime.

—Byram v. Aiken 87

SPECIFIC PERFORMANCE. See "Equity," 273.

STATUTE.

Effect of amendment of a statute "so as to read as follows."

—St. Paul, Minneapolis & Manitoba Ry. Co. v. Broulette 367

See "Boiler Inspectors' Act," 453; "Constitution," 471; "Counties and County Officers," 243; "Grain Elevator," 515; "Illegality," 135; "Insurance (Life)," 187; "Municipal Corporation," 298; "Taxes," 525.

STATUTE OF FRAUDS.

An agreement executed by defendant to plaintiff, as follows: "I, the undersigned, herewith promise to pay to the widow Margarethe Gruenenfelder, on the wedding day when she shall become my wife, the sum of $1,000," did not state the consideration so as to satisfy the statute of frauds (G. S. 1894, § 4209).

—Siemers v. Siemers 104

STATUTE OF LIMITATIONS.

Under G. S. 1894, § 5137, the mere failure of a sheriff, before demand, to pay to the party entitled money received on redemption of land from a mortgage foreclosure sale is not "an omission of an official duty," and in such case an action against him for the money is not barred within three years from its receipt.

—Hall v. Swensen 391

See "Mortgage," 133.

STOCK AND STOCKHOLDERS. See "Appeal," 495; "Corporation," 1, 28, 40, 90, 139, 249, 263, 281, 324, 432; "Evidence," 249; "Pledge," 364.

STREET RAILWAY. See "Carrier," 319; "Charge of Court," 382; "Master and Servant," 387.

STRUCK JURY. See "Constitution," 196.

SUICIDE. See "Evidence," 548.

SUMMONS. See "Corporation," 90.

SUNDAY. See "Illegality," 135.

SUPPLEMENTARY PROCEEDINGS. See "Insolvency," 156; "Mortgage," 64.

SURVEYOR. See "Constitution," 310; "Counties and County Officers," 384.

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TAX DEED. See "Municipal Corporation," 347.

TAXES.

So far as Laws 1893, c. 150, confers jurisdiction on the district court to proceed against lands on which the state has lost its lien for taxes, and against which it has no right to enforce collection thereof, it is unconstitutional.

—Kipp v. Elwell..... 525

See "Appeal," 345; "Constitution," 310; "Estate of Decedent," 124; "Mortgage," 315, 537.

TELEGRAPH COMPANY. See "Slander and Libel," 18.

TENDER. See "Mortgage," 315.

TITLE OF ACT. See "Constitution," 471; "Insurance (Life)," 187.

TOWN. See "Highway," 5.

TRIAL BY JURY. See "Constitution," 196.

TRUST.

The evidence justified a finding that a deed from son to father, in trust for the benefit of the grantor and his heirs, was improvident, unconscionable and secured by undue influence, and that it should be set aside.

—Ewing v. Clark..... 71

Where such deed was executed 32 years ago, but within two years the parties terminated the trust by reconveyance to the grantor, the cestui had no equity entitling him to have the trust enforced.

—Ewing v. Clark..... 71

See "Corporation," 90; "Execution," 84.

UNDUE INFLUENCE. See "Trust," 71.

USAGE. See "Charge of Court," 442.

USURY.

The findings sustained a conclusion that a note was not usurious.

—Mahler v. Merchants National Bank..... 37

UTTERING FORGED INSTRUMENT. See "Criminal Law," 121.

VACANCY. See "Counties and County Officers," 243.

VENDOR AND PURCHASER. See "Equity," 277.

VENUE. See "Jurisdiction," 48.

VERDICT.

Where a verdict for damages is so excessive as evidently to be the result of passion and prejudice, the court should set it aside, although former verdicts have been rendered and set aside as excessive.

—Peterson v. Western Union Telegraph Co..... 18

See "Damages," 308, 355; "Master and Servant," 308; "New Trial," 80; "Practice," 447; "Slander and Libel," 18.

WAIVER. See "Insurance (Fire)," 462; "Practice," 515; "Sale," 89, 480.

WARD. See "Municipal Corporation," 419.

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WARRANT. See "Assessment for Local Improvement," 229; "Master and Servant," 256.

WARRANTY. See "Conveyance," 115; "Insurance (Life)," 548; "Sale," 170, 449.

WASTE. See "Estate of Decedent," 124.

WATER. See "Conveyance," 543; "Possession," 500.

WILL.

Where testatrix purchased land after executon of her will, *held* that the will disclosed no intention to dispose of the land, and hence that it descended as in case of intestacy, under G. S. 1894, § 4425, providing that property acquired after the making of a will shall pass therein, if it appears thereby that such was the intention.

—Bedell v. Fradenburgh..... 361

See "Estate of Decedent," 124.

WITNESS.

Where a witness on cross-examination had previously answered an impeaching question, *held* not error to exclude it.

—Matthews v. Hershey Lumber Co..... 372

It was within the discretion of the court, on cross-examination, to exclude a question the object of which was to show that the witness had offered another money to influence his testimony in another case.

—Matthews v. Hershey Lumber Co..... 372

See "Evidence," 337, 473; "Fraud," 505; "Pleading," 240.

WORDS AND PHRASES.

"Authorize," 298.
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